

No. 89-504-CFX  
Status: GRANTED

Title: Louis W. Sullivan, Secretary of Health and Human  
Services, Petitioner  
v.  
Marilyn Finkelstein

Docketed:

September 21, 1989 Court: United States Court of Appeals  
for the Third Circuit

Counsel for petitioner: Solicitor General

Counsel for respondent: Biggiani, John E., Handal, Kenneth V.

| Entry | Date        | Note | Proceedings and Orders   |
|-------|-------------|------|--|
| 1     | Aug 8 1989  | G    | Application (A89-114) to extend the time to file a petition for a writ of certiorari from August 22, 1989 to September 21, 1989, submitted to Justice Brennan. |
| 2     | Aug 9 1989  |      | Application (A89-114) granted by Justice Brennan extending the time to file until September 21, 1989.  |
| 3     | Sep 21 1989 | G    | Petition for writ of certiorari filed.   |
| 4     | Oct 25 1989 |      | DISTRIBUTED. November 9, 1989  |
| 5     | Nov 6 1989  | P    | Response requested -- TM, JPS, SOC, AMK. (Due December 6, 1989)  |
| 7     | Nov 30 1989 |      | Order extending time to file brief of respondent on the merits until December 19, 1989.  |
| 8     | Dec 19 1989 |      | Brief of respondent Marilyn Finkelstein in opposition filed.   |
| 9     | Jan 3 1990  |      | REDISTRIBUTED. January 19, 1990  |
| 10    | Jan 5 1990  | X    | Reply brief of petitioner Louis Sullivan, Sec. filed.  |
| 11    | Jan 22 1990 |      | Petition GRANTED.<br>*****   |
| 12    | Feb 20 1990 |      | Record filed.  |
|       |             | *    | Certified copy of briefs and partial proceedings received.   |
| 13    | Feb 20 1990 |      | Record filed.  |
|       |             | *    | Certified copy of original record received.  |
| 14    | Feb 23 1990 |      | SET FOR ARGUMENT TUESDAY, APRIL 24, 1990. (1ST CASE)   |
| 15    | Mar 5 1990  | G    | Motion of the Solicitor General to dispense with printing the joint appendix filed.  |
| 18    | Mar 8 1990  |      | Brief of petitioner Louis Sullivan, Sec. filed.  |
| 16    | Mar 19 1990 |      | Motion of the Solicitor General to dispense with printing the joint appendix GRANTED.  |
| 17    | Mar 30 1990 |      | CIRCULATED.  |
| 19    | Apr 9 1990  | X    | Brief of respondent Finkelstein filed.   |
| 20    | Apr 17 1990 | X    | Reply brief of petitioner Louis Sullivan, Sec. filed.  |
| 21    | Apr 24 1990 |      | ARGUED.  |

89-5 04①

Supreme Court, U.S.

FILED

SEP 21 1989

No.

JOSEPH F. SPANIOLO, JR.  
CLERK

**In the Supreme Court of the United States**

OCTOBER TERM, 1989

LOUIS W. SULLIVAN, SECRETARY  
OF HEALTH AND HUMAN SERVICES, PETITIONER

v.

MARILYN FINKELSTEIN

PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

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58 PR

### **QUESTION PRESENTED**

Whether, in an action under 42 U.S.C. 405(g) for judicial review of the final decision of the Secretary of Health and Human Services denying a claim for Social Security disability benefits, the Secretary may appeal an order of the district court that rejects the Secretary's legal basis for the denial of benefits and remands the cause to the Secretary for a rehearing under a different legal standard.

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## In the Supreme Court of the United States

OCTOBER TERM, 1989

No.

LOUIS W. SULLIVAN, SECRETARY  
OF HEALTH AND HUMAN SERVICES, PETITIONER

v.

MARILYN FINKELSTEIN

### PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Solicitor General, on behalf of the Secretary of Health and Human Services, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

#### OPINIONS BELOW

The opinion of the court of appeals, as amended by order dated May 19, 1989 (App., *infra*, 1a-12a), and the opinion of Judge Becker dissenting from the denial of rehearing en banc (App., *infra*, 23a-24a), are reported at 869 F.2d 215, 220. The opinion of the district court (App. *infra*, 13a-18a) is unreported.

(1)

### JURISDICTION

The judgment of the court of appeals (App., *infra*, 19a-20a) was entered on March 3, 1989, and a petition for rehearing was denied on May 24, 1989 (App., *infra*, 21a-22a). By order dated August 9, 1989, Justice Brennan extended the time within which to file a petition for a writ of certiorari to and including September 21, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### STATUTORY PROVISIONS INVOLVED

1. Section 1291 (28 U.S.C.) provides in relevant part:

The court<sup>9</sup> of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States \* \* \* except where a direct review may be had in the Supreme Court.  
\* \* \*

2. Section 1292(a) (28 U.S.C.) provides in relevant part:

Except as provided in subsections (c) and (d) of this section, [1] the courts of appeals shall have jurisdiction of appeals from:

(1) Interlocutory orders of the district courts of the United States, \* \* \* or of the judges thereof,

<sup>9</sup> Subsections (c) and (d) of 28 U.S.C. 1292 concern appeals to the United States Court of Appeals for the Federal Circuit, and they therefore have no application to this case.

granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;

\* \* \* \* \*

3. Section 205(g) of the Social Security Act, as codified at 42 U.S.C. 405(g), provides (bracketed numbers added):

[1] Any individual, after any final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Secretary may allow. [2] Such action shall be brought in the district court of the United States for the judicial district in which the plaintiff resides, or has his principal place of business, or, if he does not reside or have his principal place of business within any such judicial district, in the United States District Court for the District of Columbia. [3] As part of his answer the Secretary shall file a certified copy of the transcript of the record including the evidence upon which the findings and decision complained of are based. [4] The court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Secretary, with or without remanding the cause for a rehearing. [5] The findings of the Secretary as to any fact, if supported by substantial evidence, shall be conclusive, and where a claim has been denied by the Secretary or a decision is rendered under subsection (b) of this section which is adverse to an individual

who was a party to the hearing before the Secretary, because of failure of the claimant or such individual to submit proof in conformity with any regulation prescribed under subsection (a) of this section, the court shall review only the question of the conformity with such regulations and the validity of such regulations. [6] The court may, on motion of the Secretary made for good cause shown before he files his answer, remand the case to the Secretary for further action by the Secretary, and it may at any time order additional evidence to be taken before the Secretary, but only upon a showing that there is new evidence which is material and that there is good cause for the failure to incorporate such evidence into the record in a prior proceeding; and the Secretary shall, after the case is remanded, and after hearing such additional evidence if so ordered, modify or affirm his findings of fact or his decision, or both, and shall file with the court any such additional and modified findings of fact and decision, and a transcript of the additional record and testimony upon which his action in modifying or affirming was based. [7] Such additional or modified findings of fact and decision shall be reviewable only to the extent provided for review of the original findings of fact and decision. [8] The judgment of the court shall be final except that it shall be subject to review in the same manner as a judgment in other civil actions. [9] Any action instituted in accordance with this subsection shall survive notwithstanding any change in the person occupying the office of Secretary or any vacancy in such office.

#### STATEMENT

1. Respondent is the widow of a wage earner who died on August 27, 1980, fully insured under Title II of the

Social Security Act, 42 U.S.C. 401 *et seq.* (1982 & Supp. IV 1986). On November 25, 1983, she applied for widow's disability benefits under Title II, based on coronary heart disease.

The statutory standard of disability for widows, widowers, and surviving divorced spouses<sup>2</sup> is different from and more stringent than that for wage earners. In the case of a wage earner, the Social Security Act provides that the term "disability" means the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months" (42 U.S.C. 423(d)(1)(A)). The Act further provides that a wage earner shall be determined to be under a disability only if his impairment is "of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy" (42 U.S.C. 423(d)(2)(A) (1982 & Supp. IV 1986)). By contrast, under 42 U.S.C. 423(d)(2)(B) (1982 & Supp. IV 1986), which was enacted in 1968,<sup>3</sup> a widow shall not be determined to be disabled unless her impairment is "of a level of severity which under regulations prescribed by the Secretary is deemed to be sufficient to preclude an individual from engaging in any gainful activity."

The regulations implementing the latter statutory section, which were promulgated soon after passage of Sec-

<sup>2</sup> For convenience, we shall hereafter refer to this class of persons as "widows."

<sup>3</sup> Social Security Amendments of 1967, Pub. L. No. 90-248, § 158(b), 81 Stat. 868.

tion 423(d)(2)(B) in 1968,<sup>4</sup> provide that a widow's impairment is deemed to be of sufficient severity to preclude gainful activity only if it meets or equals the severity of an impairment included in the Listing of Impairments in Appendix 1 to 20 C.F.R. Part 404, Subpart P. 20 C.F.R. 404.1577, 404.1578(a). Thus, under the regulations prescribed by the Secretary, a widow's impairment is evaluated on the basis of medical factors alone. The Secretary does not consider any further limitations on the widow's ability to work that may result from the adverse effects of her age, education, and work experience, as he would in the case of an adult wage earner. 20 C.F.R. 404.1577, 404.1578(a); see *Bowen v. Yuckert*, 482 U.S. 137, 140-142, 149 n.7 (1987); *id.* at 163-164 & n.3 (Blackmun, J., dissenting).

2. The Secretary denied respondent's application for widow's disability benefits under Section 423(d)(2)(B), concluding that respondent's coronary condition did not meet or equal an impairment contained in the section of the Listing that identifies presumptively disabling impairments of the cardiovascular system (App., *infra*, 16a). After respondent exhausted her administrative remedies through the Appeals Council, she sought judicial review of the Secretary's final decision, pursuant to 42 U.S.C. 405(g), in the United States District Court for the District of New Jersey.

The district court held that the Secretary's decision that respondent's coronary impairment did not meet or equal a listed impairment was supported by substantial evidence (App., *infra*, 17a). It further held, however, that the Secretary may not deny widow's disability benefits on that basis alone, but instead must make an individualized

<sup>4</sup> 33 Fed. Reg. 11,749, 11,751, 11,755 (1968), adding 20 C.F.R. 404.1504, 404.1506(a)(1).

determination of the functional impact of the impairment on the claimant in order to determine whether she in fact retains sufficient residual functional capacity to perform any gainful activity (*ibid.*).<sup>5</sup> The effect of this ruling was to invalidate the Secretary's longstanding regulations to the extent they require an applicant for widow's disability benefits to have an impairment that meets or equals a listed impairment.<sup>6</sup> The court therefore remanded the cause to the Secretary with directions "to inquire whether [respondent] may or may not engage in any gainful activity, as contemplated by the Act" (*id.* at 18a). See also *id.* at 25a (ordering "that the matter be remanded to the Secretary for further proceedings in accordance with [the] Court's opinion").

3. The Secretary appealed the district court's remand order. He argued that the regulations requiring an applicant for widow's disability benefits to show that she has an impairment that meets or equals the Listing are valid, and

<sup>5</sup> A claimant's "residual functional capacity" (RFC) is "what [the claimant] can do despite [his] impairment" (20 C.F.R. 404.1545). Under governing regulations, the Secretary measures a claimant's RFC only for the purpose of determining whether a wage-earner applicant can perform his past work or other work in the national economy, in light of his age, education, and work experience. 20 C.F.R. 404.1520(e) and (f), 404.1545(a), 404.1561; *Bowen v. City of New York*, 476 U.S. 467, 471 (1986). Because the Secretary does not make such a determination in the case of an applicant for widow's benefits, there is no need for him to measure a widow's RFC.

<sup>6</sup> A similar issue on the merits is before this Court in *Sullivan v. Zebley*, cert. granted, No. 88-1377 (May 15, 1989). *Zebley* involves the validity of the Secretary's regulations that require an applicant for child's disability benefits under the Supplemental Security Income Program established by Title XVI of the Social Security Act, 42 U.S.C. 1383 *et seq.* (1982 & Supp. IV 1986), to show that he has an impairment that meets or equals the severity of an impairment contained in the same adult Listing at issue here or in a special children's Listing.

that the district court therefore should have affirmed the Secretary's final decision because it correctly concluded that his finding that respondent did not have such an impairment was supported by substantial evidence. On March 3, 1989, the court of appeals dismissed the Secretary's appeal for lack of jurisdiction, holding that the district court's order was an interlocutory order, not a "final decision," for purposes of 28 U.S.C. 1291. App., *infra*, 1a-12a, 19a-20a.

The court of appeals first noted that it previously had articulated a general rule that " 'remands to administrative agencies are not ordinarily appealable under section 1291,' " because "[s]uch a remand is typically an interlocutory step in the adjudicative process and, therefore, not a final order" (App., *infra*, 4a, quoting *United Steelworkers, Local 1913 v. Union R.R.*, 648 F.2d 905, 909 (3d Cir. 1981)). The court acknowledged that its prior cases did recognize an exception to that general rule for "cases in which an important legal issue is finally resolved and review of that issue would be foreclosed 'as a practical matter' if an immediate appeal were unavailable" (App., *infra*, 4a-5a). But after reviewing its prior cases (*id.* at 5a-9a), the court found that exception inapplicable here, because " 'it is not inexorably so' " that the legal ruling on which the district court's order was based would escape appellate review (*id.* at 9a, quoting *Bachowski v. Usery*, 545 F.2d 363, 373 (3d Cir. 1976)). See generally App., *infra*, 9a-12a. The court reasoned that whether the district court properly invalidated the Listing requirement would be subject to review by the court of appeals if events after the district court's remand order unfolded in a particular way, namely: (a) if the Secretary, after considering respondent's residual functional capacity on remand, made an individualized determination that respondent is not precluded from engaging in any gainful activity; (b) if re-

spondent sought judicial review of that decision of the Secretary; (c) if the district court reversed the Secretary's new decision and ordered an award of benefits; and (d) if the Secretary appealed that subsequent order of the district court to the court of appeals. *Id.* at 9a-10a, 11a.

The court acknowledged that the Secretary may be denied any appellate review of the district court's legal ruling if events did not unfold in the manner just described—specifically if, on remand, the Appeals Council was required to find respondent disabled and awarded her benefits under the district court's view of the statutory standards governing widow's disability benefits. App., *infra*, 9a-10a, 11a. But the court concluded that this possible preclusion of any opportunity for the Secretary to obtain appellate review of the central legal issue in the case was "of no more significance" than it was in several prior Third Circuit cases (*id.* at 11a).

The court of appeals also acknowledged that, in prior cases, it had found appellate jurisdiction over district court orders that required an agency to hold a hearing or to conduct further proceedings on remand, on the theory that the order constituted a final rejection of the agency's position that no hearing or other further proceedings were required (App., *infra*, 7a-9a, 12a). But the court found that rationale inapposite here, because, in its view, the legal issue presented here was not whether the governing statute or regulations required a hearing, but whether an additional factor (respondent's residual functional capacity) must be considered by the Secretary before he makes a final administrative adjudication of the benefit claim (*id.* at 12a).

4. The Secretary's petition for rehearing en banc was denied, with three judges dissenting (App., *infra*, 21a-22a). Judge Becker, who was a member of the panel, explained his vote for rehearing en banc in a statement that was joined by Judges Sloviter and Stapleton (*id.* at 23a-24a).

Judge Becker stated that he had joined the panel's opinion because he felt bound to do so by the Third Circuit's decision in *Bachowski v. Usery*, 545 F.2d 363 (1976), even though *Bachowski* "seems inconsistent at least with the spirit of [the Third Circuit's] later jurisprudence" (App., *infra*, 23a). But if free to do so, Judge Becker explained, he would hold that the court of appeals had appellate jurisdiction in this case, following the reasoning of the District of Columbia Circuit's recent decision in *Occidental Petroleum Corp. v. SEC*, 873 F.2d 325, 328-332 (1989). Judge Becker elaborated (App., *infra*, 23a):

In [*Occidental Petroleum*], Judge Ginsburg, speaking for the court, expressed the view that Congress did not intend that the final order rule place an agency in a position of dependence upon the self-interest of others in order to get review of a legal decision that dictates the standards and procedures to be applied by the agency in making its decisions. Here, as in *Occidental*, the Secretary is between the proverbial rock and a hard place. If the Secretary, bound by the district court's opinion, grants benefits on remand to [respondent], he cannot appeal. If the Secretary does not grant benefits on remand, whether or not the legal issue will be reviewed depends on whether [respondent] decides to press an appeal.<sup>7</sup>

#### REASONS FOR GRANTING THE PETITION

The court of appeals has held that the Secretary of Health and Human Services may not appeal a district court order that rejects the legal basis for the Secretary's decision denying benefits and remands the cause for a

<sup>7</sup> On September 8, 1989, the district court, with respondent's consent, stayed its order of remand pending this Court's disposition of the instant petition for a writ of certiorari.

rehearing by the Secretary under different legal standards. Contrary to the view of the court of appeals, such an order is a "final decision" of the district court within the meaning of 28 U.S.C. 1291, because it finally determines that the decision of the Secretary that is before the court on judicial review is contrary to law and because the Secretary may be deprived of an opportunity for appellate review of the district court's legal ruling if he is required to award benefits on remand under the legal standards imposed by the district court. The text of 42 U.S.C. 405(g) confirms this conclusion, because it deems the judgment of a district court that affirms, modifies or reverses the Secretary's decision, "with or without remanding the cause for a rehearing" by the Secretary, to be a "final judgment," subject to appellate review like any other final judgment in a civil action. Such an order also is appealable pursuant to 28 U.S.C. 1292(a)(1), because it enjoins the Secretary to conduct a new hearing under different legal standards.

The question whether the Secretary may appeal an order remanding the cause to him for redetermination under different legal standards is one of substantial and recurring importance in litigation arising under the Social Security Act, and it has generated conflicting holdings among the courts of appeals in cases arising under that Act. The question of the appealability of remand orders also is of substantial importance outside the Social Security context. Review by this Court therefore is clearly warranted.

1. a. The court of appeals erred in concluding that it did not have jurisdiction over the Secretary's appeal. Under 28 U.S.C. 1291, the courts of appeals have jurisdiction of appeals from all "final decisions" of the district courts. A party ordinarily may not take an appeal under Section 1291 "until there has been a decision by the District Court that 'ends the litigation on the merits and

leaves nothing for the court to do but execute the judgment.' " *Van Cauwenberghe v. Biard*, 108 S. Ct. 1945, 1949 (1988), quoting *Catlin v. United States*, 324 U.S. 229, 233 (1945). This general rule avoids the disruption of ongoing proceedings in the trial court that would be occasioned by "piecemeal appellate review," and thus promotes the "efficient administration of justice" (*Flanagan v. United States*, 465 U.S. 259, 264 (1984)). In addition, the rule "emphasizes the deference that appellate courts owe to the trial judge as the individual initially called upon to decide the many questions of law and fact that occur in the course of a trial," thereby respecting the "independence of the district judge, as well as the special role that individual plays in our judicial system." *Van Cauwenberghe v. Biard*, 108 S. Ct. at 1949 n.3, quoting *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 374 (1981).

By the terms of Section 1291, however, "it is a final decision that Congress has made reviewable," not a final judgment. *Stack v. Boyle*, 342 U.S. 1, 12 (1951) (opinion of Jackson, J.). As a result, "a decision 'final' within the meaning of § 1291 does not necessarily mean the last order possible to be made in [the] case." *Mitchell v. Forsyth*, 472 U.S. 511, 524 (1985), quoting *Gillespie v. United States Steel Corp.*, 379 U.S. 148, 152 (1964). And in determining whether a particular type of order is immediately appealable under Section 1291, the requirement of finality must be given a "practical rather than a technical construction." *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949).

Heretofore, the Court has considered the application of 28 U.S.C. 1291 in the context of orders entered during or at the conclusion of unitary proceedings in the district court itself. In that setting, the practical construction of Section 1291 has been most evident in the "collateral order" doctrine, which recognizes a small class of deci-

sions that are immediately appealable under Section 1291 even though they do not terminate the proceedings in the district court. That class consists of decisions "which finally determine claims of right separate from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. at 546. See, e.g., *Midland Asphalt Corp. v. United States*, 109 S. Ct. 1494, 1497 (1989). Under the common formulation of the collateral order doctrine, an order, to be immediately appealable, must (1) "conclusively determine the disputed question," (2) "resolve an important issue completely separate from the merits of the action," and (3) "be effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978). See, e.g., *Lauro Lines S.R.L. v. Chasser*, 109 S. Ct. 1976, 1978 (1989); *Richardson-Merrill, Inc. v. Koller*, 472 U.S. 424, 431 (1985).

b. This case differs from the Court's prior cases applying the finality requirement of Section 1291. The order at issue here was not entered in ordinary civil or criminal litigation in district court, in which adjudication of all legal and factual issues takes place in unitary proceedings before the court. The order was entered in the quite different context of judicial review of final agency action, which in turn was the product of distinct administrative proceedings and embodied the agency's considered determination of all issues of fact and law bearing on respondent's claim for benefits.

The district court's order in this case was a "final decision" for purposes of 28 U.S.C. 1291 because it finally determined that a particular decision of the Secretary was contrary to law and remanded the matter to the Secretary to conduct a fresh round of administrative proceedings under different legal standards. Although the district

court might have occasion to consider respondent's claim for benefits again at a later date—if respondent sought judicial review of the new decision rendered by the Secretary on remand—the focus of the judicial proceedings at that point would be on the Secretary's second decision. Moreover, if the factual record before the Secretary on remand should require him to find respondent disabled and award her benefits under the legal standards imposed by the district court, the Secretary could not ordinarily seek judicial review of his own decision in favor of the claimant. The court of appeals in fact acknowledged that in those circumstances, its construction of 28 U.S.C. 1291 would require the Secretary to forgo *all* opportunity for appellate review of the district court's invalidation of the Listing approach. But see note 10, *infra*.

The foregoing considerations have led the courts of appeals to apply the principles of finality under Section 1291 with a practical regard for the unique aspects of a civil action for judicial review of agency action. They have held that, as a general rule, an order remanding a matter to an administrative agency for further proceedings is interlocutory, not final, and therefore may not be immediately appealed under 28 U.S.C. 1291. See *Occidental Petroleum Corp. v. SEC*, 873 F.2d 325, 329-330 (D.C. Cir. 1989) (collecting cases from every circuit). But as the District of Columbia Circuit further explained in *Occidental Petroleum*, the courts have recognized an exception to that rule where the remand order finally disposes of a legal issue on which the agency's decision was based, and the agency may not have an effective opportunity to appeal at a later date. See *id.* at 330-332. The order in the instant case falls within this exception, as Judge Becker recognized in urging the Third Circuit to follow *Occidental Petroleum*. Indeed, as we explain below (see pages 23-24, *infra*), the courts of appeals have long recognized the right

of the Secretary to take an appeal in circumstances such as those presented here.

c. The district court's order in this case was a "final decision" for purposes of 28 U.S.C. 1291 under either of two alternative theories. On the one hand, if the proceedings before the court are regarded as largely distinct from those before the agency, the remand order is appealable because it effectively terminated the relevant judicial proceedings. The order represented a final rejection of a particular decision of the Secretary (which denied respondent's application for benefits on the ground that her impairment did not meet or equal the Listing), and returned the claim for benefits to the Executive Branch officer charged with administering the disability program.

On the other hand, if the proceedings before the Secretary and those before the court are regarded as separate components of one broader controversy regarding respondent's claim for benefits,<sup>8</sup> the district court's order is appealable under principles analogous to those underlying the "collateral order" doctrine that the Court has recognized for certain orders entered in the course of on-going proceedings in the district court. This is so because the order finally resolves an important legal issue concerning the validity of the Secretary's regulations governing widow's disability claims; that issue is separate from the factual issues (concerning respondent's ability to perform gainful activity) that will be considered in further administrative proceedings on remand and in any subse-

<sup>8</sup> In *Sullivan v. Hudson*, 109 S. Ct. 2248, 2254-2257 (1989), the Court held that proceedings before the Secretary on remand from a district court are sufficiently related to the civil action for judicial review under 42 U.S.C. 405(g) to permit a court to award attorney's fees for services rendered before the Secretary on remand as part of its award under the Equal Access to Justice Act (EAJA), 28 U.S.C. 2412(d), for services rendered in judicial proceedings.

quent judicial review of the Secretary's second decision in the district court;<sup>9</sup> and the Secretary may not have an effective opportunity for appellate review of that legal issue at a later date.<sup>10</sup>

<sup>9</sup> In the familiar context of unitary proceedings in the district court, an order that invalidates governing regulations and sets the case for trial under a different legal standard would not satisfy the second prong of the three-prong test for collateral orders announced in *Coopers & Lybrand*, 437 U.S. at 468, because the legal issue regarding the validity of the regulations would not be "completely separate from the merits of the action." See *Daviess County Hospital v. Bowen*, 811 F.2d 338, 342 (7th Cir. 1987). However, neither the *Cohen* rule nor its particular requirement of a "separate" legal issue should be applied in precisely the same manner in the distinct context of judicial review of agency action. But see *Harper v. Bowen*, 854 F.2d 678, 681-682 (4th Cir. 1988).

The second prong of the *Coopers & Lybrand* test, like the first prong (which requires that the legal issue be "conclusively determined"), prevents an appeal before all relevant legal and factual issues have been fully developed and resolved at trial; if the legal issue addressed by the district court's order is separate, there is much less chance that subsequent developments at trial will cast new light on the issue or prompt the court to reconsider it. In the instant case, however, there will be no further development of legal or factual issues by the district court at a trial, since the further proceedings ordered by the district court will be conducted in an administrative forum. Moreover, because any deviation by the Secretary from the legal standard imposed by the district court's remand order would itself be legal error (*Sullivan v. Hudson*, 109 S. Ct. at 2254), the validity of the widow's disability regulations will not be open for consideration in the administrative proceedings on remand (or, presumably, in proceedings in the district court on judicial review of the Secretary's new decision). Thus, the very nature of judicial review of agency action—and of an order remanding a matter to the agency for further proceedings under different legal standards—ensures that the legal issue resolved by the remand order will be sufficiently separate from the issues to be considered in further proceedings to satisfy the concerns underlying this Court's *Coopers & Lybrand* test.

<sup>10</sup> In *Harper v. Bowen*, 854 F.2d at 681, the court believed it was "possible" that the Secretary might be able to appeal the legal ruling

Moreover, under either theory, the balance of considerations that have informed the development of finality principles under 28 U.S.C. 1291 supports the Secretary's right of appeal here. Because the order constitutes a final rejection of the Secretary's reliance on the Listing as a basis for rejecting respondent's claim—and because the rehearing of the claim mandated by the district court will take place before the Secretary, not the court—an appeal by the Secretary would not interfere with on-going proceedings in the district court or undermine the independence or special role of the district judge. Conversely, a refusal to allow the Secretary to appeal the order invalidating his longstanding regulatory requirement for widow's disability claims *would* undermine the special role and distinct responsibilities of the Secretary, the Executive

embodied in the district court's remand order even if he was required to award benefits on remand under the different legal standards imposed by the district court. The court based that belief on its view that the Secretary must file the additional administrative record and decision on remand with the district court, and it suggested that the court could then enter a judgment in favor of the claimant on the basis of that additional record and decision and that the Secretary might be able to appeal from such a judgment.

Contrary to the Fourth Circuit's view, however, nothing in 42 U.S.C. 405(g) requires the Secretary, after a remand based on legal error in the Secretary's first decision, to file with the district court a new decision in favor of the claimant. The only situation in which 42 U.S.C. 405(g) requires a further filing with the court is specified by the sixth sentence of Section 405(g), which applies where the district court remands the cause to the Secretary for the receipt of additional evidence *before* the court reaches the merits of the Secretary's decision. See *Sullivan v. Hudson*, 109 S. Ct. at 2254. It may also be appropriate for the Secretary to file his new decision with the district court following the distinct type of remand at issue here for the limited purpose of enabling the district court to determine whether to award attorney's fees under the EAJA, since only then would the claimant be a prevailing party. *Id.* at 2254-2255.

Branch officer entrusted with responsibility for implementing the Social Security Act and rendering decisions on claims arising under it. Such a rule of non-appealability also would impose an unwarranted burden on "an already overburdened agency" (*Heckler v. Campbell*, 461 U.S. 458, 468 (1983)), because it would require the Secretary to conduct additional proceedings that would prove to be unnecessary and wasteful of scarce resources if (as the Secretary firmly believes) the regulations governing widow's disability claims are ultimately found to be valid. See *Occidental Petroleum*, 873 F.2d at 329; *Stone v. Heckler*, 722 F.2d 464, 467 (9th Cir. 1983); cf. *Palmer v. City of Chicago*, 806 F.2d 1316, 1318-1319 (7th Cir. 1986), cert. denied, 481 U.S. 1049 (1987). Thus, recognition of the Secretary's right to appeal the order at issue here would promote, not undermine, the "efficient administration of justice" (*Flanagan*, 465 U.S. at 264).

d. For similar reasons, if the remand order is not regarded as a final judgment that effectively terminated the relevant proceedings in the district court, the court of appeals also had jurisdiction in this case under 28 U.S.C. 1292(a)(1). Section 1292(a)(1) vests the courts of appeals with jurisdiction of appeals from interlocutory orders granting or denying injunctions. The district court's order in this case had the effect of granting an injunction, because it did more than simply remand the cause; it "directed" the Secretary to conduct further proceedings to inquire whether respondent can engage in any gainful activity (App., *infra*, 18a). See *Avery v. Secretary of HHS*, 762 F.2d 158, 160 (1st Cir. 1985); but see *United States v. Louisiana-Pacific Corp.*, 846 F.2d 43, 45 (9th Cir. 1988). The order did not merely govern the conduct of the parties in connection with proceedings before the district court itself on matters unrelated to substantive issues in the case. See *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 108 S. Ct. 1133, 1138 (1988); *International Products Corp.*

*v. Koons*, 325 F.2d 403, 406-407 (2d Cir. 1963). Rather, it granted partial relief on the merits and ordered further proceedings in a different forum. Compare *Switzerland Cheese Ass'n v. E. Horne's Market, Inc.*, 385 U.S. 23, 25 (1966); *Baltimore Contractors, Inc. v. Bodinger*, 348 U.S. 176, 183 (1955); *Morgantown v. Royal Insurance Co.*, 337 U.S. 254, 257-258 (1949); *Hunt v. Bankers Trust Co.*, 799 F.2d 1060, 1066-1067 (5th Cir. 1986).<sup>11</sup>

2. a. Both of the alternative theories of appealability under 28 U.S.C. 1291 discussed above were articulated in *Cohen v. Perales*, 412 F.2d 44, 48-49 (5th Cir. 1969), rev'd on other grounds, 402 U.S. 389 (1971), the seminal decision confirming an agency's right of appeal in circumstances such as these. In *Perales*, the district court reversed the Secretary's decision denying the claim for benefits and remanded for a new hearing on the ground that the written reports of medical experts, on which the administrative law judge relied, did not constitute substantial evidence to support the Secretary's decision denying the claim for benefits. The court of appeals held that it

<sup>11</sup> The Third and District of Columbia Circuits have construed *Carson v. American Brands, Inc.*, 450 U.S. 79, 84-90 (1981), not to require a showing, in all circumstances, that an order granting an injunction must have serious and perhaps irreparable consequences in order to be appealable under 28 U.S.C. 1292(a)(1). See *Cohen v. Board of Trustees of University of Medicine*, 867 F.2d 1455, 1466-1468 (3d Cir. 1989); *I.A.M. Nat'l Pension Fund v. Cooper Industries, Inc.*, 789 F.2d 21, 24 n.3 (D.C. Cir. 1986); see also *Baltimore Contractors*, 348 U.S. at 182 ("The appealability of routine interlocutory injunctive orders raised few questions."); P. Bator, D. Meltzer, P. Mishkin & D. Shapiro, *The Federal Courts and the Federal System* 1816-1817 (3d ed. 1988). But see *Thompson v. Enomoto*, 815 F.2d 1323, 1327 (9th Cir. 1987).

had jurisdiction over the Secretary's appeal from the district court's order under 28 U.S.C. 1291.<sup>12</sup>

In holding that the order was "final" in the usual sense of concluding the judicial proceedings, the Fifth Circuit in *Perales* relied on the fourth and eighth sentences of 42 U.S.C. 405(g). See 412 F.2d at 48. The fourth sentence provides that on judicial review, a district court "shall have power to enter \* \* \* a judgment affirming, modifying, or reversing the decision of the Secretary, with or without remanding the cause for a rehearing." The eighth sentence provides that "[t]he judgment of the court shall be final except that it shall be subject to review in the same manner as a judgment in other civil actions." These two sentences make it clear that a district court order that sets aside the Secretary's decision on the merits because of legal error is not deprived of its finality—at least insofar as the Secretary's right of appeal is concerned—simply because the district court also remands the cause for a rehearing by the Secretary.<sup>13</sup> Whether or not it remands the cause, the district court's ruling constitutes a final rejection of the *first* decision of the Secretary. If the Secretary again finds the claimant not disabled in the proceedings on remand, it would be that *second* decision of the Secretary that would be the subject of any subsequent application for judicial

<sup>12</sup> See also *Gold v. Weinberger*, 473 F.2d 1376, 1378 (5th Cir. 1973).

<sup>13</sup> The term "judgment" is a term of art that "includes a decree and any order from which an appeal lies." Fed. R. Civ. P. 54(a). Accordingly, Congress's use of the term "judgment" in the fourth sentence of 42 U.S.C. 405(g) to encompass orders that remand the cause to the Secretary strongly supports the Secretary's right of appeal here. This conclusion is reinforced by the specification in the eighth sentence that the "judgment" of the district court (which necessarily includes those mentioned in the fourth sentence that remand the cause to the agency) "shall be final" and "shall be subject to review in the same manner as a judgment in other civil actions."

review. For this reason, the Fifth Circuit in *Perales* correctly relied on 42 U.S.C. 405(g) in finding jurisdiction over the Secretary's appeal because the district court's order effectively terminated the relevant judicial proceedings.

The Fifth Circuit in *Perales* also relied on "collateral order" principles in finding the district court's remand order appealable. 412 F.2d at 48-49. It noted that the district court not only had denied the motions for summary judgment and reversed the Secretary's decision on the merits, but also had established standards for the admission of hearsay evidence in the administrative proceedings on remand. Following this Court's admonition to give Section 1291 a practical rather than a technical construction, the Fifth Circuit concluded that such an order fit the rationale of *Cohen v. Beneficial Industrial Loan Corp.* The court reasoned that "[u]nless the Secretary is allowed to appeal from this order, he will never be able to reach the questions involved, because on the next appeal, if there is one, the sole question may be the substantiality of the evidence, and not its admissibility." 412 F.2d at 48.

b. The Fifth Circuit stressed in *Perales* that not all remand orders in Social Security cases are immediately appealable. The court specifically referred in this regard to orders covered by the sixth sentence of Section 405(g), which allows a district court, *before* it reaches the merits of the Secretary's decision, to remand the cause to the Secretary for the receipt of additional evidence. 412 F.2d at 48. This procedure was included to provide a mechanism for the receipt of newly discovered evidence in a case in which judicial review of the Secretary's decision is based on the administrative record.<sup>14</sup> By contrast, the

<sup>14</sup> We agree that such an order is not appealable, because it does not represent a final rejection of the Secretary's decision that is the subject

order in this case (like that in *Perales*) did represent a final rejection of the Secretary's decision, which denied respondent's claim because her impairment did not meet or equal the Listing.

c. This Court reversed the Fifth Circuit's ruling on the merits in *Perales*, without questioning the jurisdiction of the court of appeals over the Secretary's appeal from the district court's remand order. See *Richardson v. Perales*, 402 U.S. 389 (1971). Because the jurisdictional issue was discussed at length in the Fifth Circuit's opinion—and because the jurisdiction of this Court under 28 U.S.C. 1254(1) depended on whether the case was properly “in” the court of appeals under 28 U.S.C. 1291 (see *United States v. Nixon*, 418 U.S. 683, 690, 692 (1974))—the Court presumably would have adverted to the jurisdictional issue if it had questioned the correctness of the Fifth Circuit's resolution of it. Since that time, a number of other courts

of judicial review. See *Perales*, 412 F.2d at 48, citing *Bohms v. Gardner*, 381 F.2d 283 (8th Cir. 1967) (Blackmun, J.), cert. denied, 390 U.S. 964 (1968). The prior Third Circuit Social Security cases cited by the panel below were remands pursuant to the sixth sentence of 42 U.S.C. 405(g). See App., *infra*, 5a, citing *Mayersky v. Celebrezze*, 353 F.2d 89 (3d Cir. 1965); *Marshall v. Celebrezze*, 351 F.2d 467 (3d Cir. 1965). Moreover, in *Bohms*, *Mayersky*, and *Marshall*, the appeal from the remand order was taken by the claimant, not the Secretary. A number of courts have held that the claimant may not appeal a remand order under 28 U.S.C. 1291, since he may seek judicial review of any adverse decision of the Secretary on remand. See *Dalto v. Richardson*, 434 F.2d 1018 (2d Cir. 1970), cert. denied, 401 U.S. 979 (1971); *Beach v. Bowen*, 788 F.2d 1399 (8th Cir. 1986); *Gilchrist v. Schweiker*, 645 F.2d 818 (9th Cir. 1981); *Farr v. Heckler*, 729 F.2d 1426 (11th Cir. 1984); *Howell v. Schweiker*, 699 F.2d 524 (11th Cir. 1983); see also *Occidental Petroleum*, 873 F.2d at 331-332; *Mall Properties, Inc. v. Marsh*, 841 F.2d 440, 442-443 (1st Cir.), cert. denied, 109 S. Ct. 128 (1988); *Memorial Hospital System v. Heckler*, 769 F.2d 1043 (5th Cir. 1985).

of appeals have followed *Perales*. In fact, insofar as we have been able to ascertain, it was not until quite recently, long after 42 U.S.C. 405(g) was enacted in 1939,<sup>15</sup> that any court has held that the Secretary may not appeal a remand order under Section 405(g) in circumstances such as those presented here.

3. The jurisdictional ruling by the Third Circuit in this case conflicts not only with the decision in *Perales* but also with the decisions of a number of other courts of appeals. The First, Sixth, Ninth and Tenth Circuits have followed *Perales* in finding jurisdiction over appeals by the Secretary from remand orders. See *Colon v. Secretary of HHS*, 877 F.2d 148, 149-151 (1st Cir. 1989); *Lopez Lopez v. Secretary of HEW*, 512 F.2d 1155, 1156 (1st Cir. 1975); *Edmond v. HHS*, No. 89-3161 (6th Cir. Apr. 19, 1989);<sup>16</sup> *Stone v. Heckler*, 772 F.2d 464, 466-468 (9th Cir. 1983); *Ensey v. Richardson*, 469 F.2d 664 (9th Cir. 1972); *Paluso v. Mathews*, 573 F.2d 4, 7-8 (10th Cir. 1978) (Black Lung case); see also *McGill v. Secretary of HHS*, 712 F.2d 28, 29-30 (2d Cir. 1983) (dictum), cert. denied, 465 U.S. 1068 (1984). The Seventh Circuit has reached a similar result under the parallel judicial review provisions of the Medicare Act. See *Daviess County Hospital v. Bowen*, 811 F.2d 338, 341-342 (7th Cir. 1987); *Edgewater Hospital, Inc. v. Bowen*, 857 F.2d 1123 (7th Cir. 1988).<sup>17</sup> Moreover, the District of Columbia Circuit, which apparently has not had occasion to address the appealability issue in the

<sup>15</sup> Act of Aug. 10, 1939, ch. 686, § 201, 53 Stat. 1368.

<sup>16</sup> But cf. *Whitehead v. Califano*, 596 F.2d 1315, 1319 (6th Cir. 1979) (Secretary may not appeal remand order by magistrate where Secretary did not first appeal order to district court).

<sup>17</sup> The Seventh Circuit had expressed a similar view in dictum in an earlier decision under the Social Security Act that was cited in *Perales*. See 412 F.2d at 48, citing *Jamieson v. Folsom*, 311 F.2d 506, 507 (7th Cir.), cert. denied, 374 U.S. 487 (1963).

Social Security context, recently held in *Occidental Petroleum*, after a thorough examination of the issue in an analogous context, that an agency may appeal a remand order under 28 U.S.C. 1291. See also *Bender v. Clark*, 744 F.2d 1424, 1426-1428 (10th Cir. 1984).

Other courts of appeals that also once held the Secretary may appeal a remand order have since expressed a contrary view, albeit without acknowledging their own contrary precedent.<sup>18</sup> For example, although the Fourth Circuit previously had followed *Perales* in holding that the Secretary could appeal a remand order in a Black Lung case (see *Souch v. Califano*, 599 F.2d 577, 578 n.1 (1979)), it more recently held, without mentioning its prior ruling, that the Secretary may not appeal a remand order under similar circumstances. See *Harper v. Bowen*, 854 F.2d 678 (4th Cir. 1988). Similarly, although the Eighth Circuit had found jurisdiction over an appeal by the Secretary even prior to *Perales* (*Gardner v. Moon*, 360 F.2d 556, 558 n.2 (8th Cir. 1966)), it since has stated in dictum, without mentioning *Moon*, that the Secretary may not take an appeal under 28 U.S.C. 1291. *McCoy v. Schweiker*, 683 F.2d 1138, 1141 n.2 (8th Cir. 1982) (en banc). Most remarkably, the Fifth Circuit recently held in an unpublished order that the Secretary could not appeal a remand order, and it did so without even citing its own contrary precedent in *Perales*. See *Haywood v. Bowen*, No. 88-1280 (Nov. 30, 1988) (862 F.2d 873 (1988) (Table)).<sup>19</sup>

<sup>18</sup> Even the Third Circuit, in the *Bachowski* decision upon which the panel relied in this case, appeared to acknowledge the correctness of the *Perales* rule, while finding it inapplicable on the facts of *Bachowski* itself. 545 F.2d at 367 & n.16, 372-373. By contrast, the Third Circuit did not even cite *Perales* and its progeny in its decision in this case.

<sup>19</sup> The Eleventh Circuit, which is bound by Fifth Circuit precedents (see *Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir.

The jurisdictional issue presented by this case is of recurring importance in litigation arising under the Social Security Act, since claimants increasingly raise jurisdictional objections to appeals by the Secretary from remand orders, even in circuits that previously had sustained the Secretary's right of appeal. The jurisdictional issue also is one of recurring importance outside the Social Security context, where it has generated thoughtful analyses by several other courts of appeals that have sustained the agency's right of appeal. See *Occidental Petroleum Corp. v. SEC*, *supra*; *Mall Properties, Inc. v. Marsh*, 841 F.2d 440, 442-443 (1st Cir.), cert. denied, 109 S. Ct. 128 (1988); *Bender v. Clark*, *supra*. The decision of the Third Circuit conflicts with these jurisdictional rulings outside the Social Security context, as well as those, discussed above, in cases arising directly under that Act. Review by this Court therefore is plainly warranted.

1981) (en banc)), has expressly followed the Fifth Circuit's *Perales* precedent in finding several remand orders appealable. See *Pickett v. Bowen*, 833 F.2d 288, 290-291 (11th Cir. 1987); *Huie v. Bowen*, 788 F.2d 698, 701-703 (11th Cir. 1986). In two other cases, however, it dismissed appeals by the Secretary in brief orders, without even citing *Perales*. See *Jordan v. Heckler*, 721 F.2d 349 (11th Cir. 1983); *Biddle v. Heckler*, 721 F.2d 1321 (11th Cir. 1983).

**CONCLUSION**

The petition for a writ of certiorari should be granted.  
Respectfully submitted.

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SEPTEMBER 1989

**APPENDIX A**

**UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT**

No. 88-5318

MARILYN FINKELSTEIN, APPELLEE

v.

OTIS R. BOWEN, M.D., SECRETARY OF HEALTH AND  
HUMAN SERVICES, APPELLANT

On Appeal from the United States District Court for  
the District of New Jersey  
(D.C. Civil Action No. 85-0345)

[Filed Mar. 3, 1989]

**OPINION**

BEFORE: BECKER, HUTCHINSON and SCIRICA,  
*Circuit Judges*

HUTCHINSON, *Circuit Judge*.

The Secretary of Health and Human Services (Secretary) appeals an order of the United States District Court for the District of New Jersey. The district court had remanded this action for widow's disability benefits under the Social Security Act to the Secretary for consideration of the applicant's residual functional capacity.

(1a)

That order is not final for purposes of appellate review. We will therefore dismiss this appeal for lack of jurisdiction.

# I.

On November 25, 1983, Mrs. Marilyn Finkelstein applied for disabled widow's benefits pursuant to 42 U.S.C.A. § 423(d)(2)(B) (West Supp. 1988). Her application was denied both initially and on reconsideration. After a hearing on September 28, 1984, an Administrative Law Judge (ALJ) determined that Mrs. Finkelstein's heart ailment did not meet or equal an impairment listed in the regulations<sup>1</sup> and denied benefits. That denial became the Secretary's final decision on December 11, 1984, when the Appeals Council denied Mrs. Finkelstein's request for review.

Pursuant to 42 U.S.C.A. § 405(g) (West 1983), Mrs. Finkelstein filed suit in the district court, claiming that the ALJ's decision was not supported by substantial evidence. The district court rejected this argument, but nevertheless remanded the case to the Secretary "for reasons other than those cited by [the] plaintiff." *Finkelstein v. Bowen*, No. 85-0345, slip op. at 5 (D.N.J. Feb. 18, 1988). It directed the Secretary to consider "the functional impact of plaintiff's ailment," *id.*, in order to determine whether, beyond the issue of equivalence of impairments, Mrs. Finkelstein could yet engage in any gainful activity. *Id.* at 6. This appeal followed.

On the merits, the Secretary argues that, in the case of widow's disability benefits, the statute and applicable regulations require him to look only to whether an applicant's impairment meets or equals an impairment listed in

<sup>1</sup> 20 C.F.R. Part 404, Subpart P, Appendix 1 (1987).

the regulations.<sup>2</sup> The inquiry, he contends, does not extend, as in the case of a wage earner's disability, to examination of residual functional capacity.<sup>3</sup> Instead, the Secretary argues, a widow's disability is governed by a stricter standard<sup>4</sup> and a denial of benefits is required if her

<sup>2</sup> Under the Social Security Act, a widow is not disabled "unless . . . her physical or mental impairment or impairments are of a level of severity which under regulations prescribed by the Secretary is deemed to be sufficient to preclude an individual from engaging in any gainful activity." 42 U.S.C.A. § 423(d)(2)(B).

The "regulations prescribed by the Secretary" for deeming impairments sufficiently severe to preclude any gainful activity mandate a two-step inquiry. First, a widow is not disabled if she is "doing substantial gainful activity." 20 C.F.R. § 404.1578(b) (1987). Second, a widow is disabled if her "impairment(s) has specific clinical findings that are the same as those for any impairment in the Listing of Impairments in Appendix 1 or are medically equivalent to those for any impairment shown there." *Id.* § 404.1578(a)(1). These impairments, by virtue of their inclusion in the regulatory listing, are considered "severe enough to prevent a person from doing any gainful activity." *Id.* § 404.1525(a) (1987).

<sup>3</sup> Under the Social Security Act, a wage earner's disability is defined, in relevant part, as "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment." 42 U.S.C.A. § 423(d)(1)(A) (West Supp. 1988). The process for determining a wage earner's disability includes inquiries into whether the wage earner is engaged in substantial gainful activity, has a severe impairment, and whether this impairment meets or equals any in the regulatory listing. However, if a wage earner's impairment does not meet or equal any in the listing, the inquiry continues for the purpose of determining whether his residual functional capacity allows him to do past work and, finally, whether his residual functional capacity, along with vocational factors like age, education, and past work experience, allows him to do any other work. 20 C.F.R. § 404.1520 (1987).

<sup>4</sup> The regulations expressly state that age, education, and past work experience are ignored when evaluating a widow's disability. 20 C.F.R. § 404.1577 (1987). On the merits, the issue is whether a widow

impairment is not equivalent to one listed in the regulations.

## II.

At the threshold, we are faced with the question of appellate jurisdiction. Both parties initially asserted<sup>5</sup> that we have jurisdiction under 28 U.S.C.A. § 1291 (West Supp. 1988). That section gives us the authority to review "final orders" of the federal district courts. We have said that "remands to administrative agencies are not ordinarily appealable under section 1291." *United Steelworkers of America Local 1913 v. Union R.R.*, 648 F.2d 905, 909 (3d Cir. 1981). Such a remand is typically an interlocutory step in the adjudicative process and, therefore, not a final order. *Id.* Therefore, we can exercise appellate jurisdiction over this case only if it comes within an exception to the ordinary rule.

Case law does provide examples of a narrow exception to the normal rule of non-appealability. Application of this exception is limited to cases in which an important

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whose impairment does not meet or equal any in the listing is entitled to have her residual functional capacity considered. Because we lack appellate jurisdiction over the district court's interlocutory order remanding the case to the Secretary, we express no opinion on that issue. We have held, however, that a stricter standard does apply in widow's disability cases. See, e.g., *Smith v. Schweiker*, 671 F.2d 789, 790 (3d Cir. 1982) ("the test for establishing entitlement to disability benefits is more stringent for widows").

<sup>5</sup> At oral argument on September 8, 1988, we requested letter memoranda on this question of appellate jurisdiction. By her letter memorandum dated September 21, 1988, Mrs. Finkelstein now contends that the district court's order is not appealable and that we lack jurisdiction. The Secretary contends the district court's order is appealable. The parties' positions on jurisdiction are, of course, not controlling.

legal issue is finally resolved and review of that issue would be foreclosed "as a practical matter" if an immediate appeal were unavailable. See, e.g., *AJA Assocs. v. Army Corps of Eng'rs*, 817 F.2d 1070, 1073 (3d Cir. 1987). Whether applying the normal rule or the exception, our inquiry focuses on "the particular order brought to this court." *Bachowski v. Usery*, 545 F.2d 363, 372 (3d Cir. 1976); see also *United Steelworkers*, 648 F.2d at 909 ("To assess these contentions, we must consider the nature of the district court's order.").

After examining the circumstances of the cases applying the normal rule of non-appealability and those holding that appellate jurisdiction over particular remand orders is available, we have concluded that the exception to the normal rule does not apply. Therefore, we lack appellate jurisdiction.

## A.

We turn first to cases in which we applied the normal rule and held district court remand orders interlocutory rather than final. In *Marshall v. Celebrezze*, 351 F.2d 467 (3d Cir. 1965) (per curiam), a Social Security disability case, the Secretary asked the district court to remand so he could take additional evidence. The district court granted the motion and the applicant appealed. We dismissed the appeal as interlocutory. See also *Mayersky v. Celebrezze*, 353 F.2d 89 (3d Cir. 1965) (district court remand to obtain additional evidence in Social Security disability case not final).

Our decision in *Bachowski* is particularly relevant. Alleging violations of the Labor-Management Reporting and Disclosure Act and other irregularities, *Bachowski* sought to overturn the results of a union officer election. The Secretary of Labor refused to file suit to set aside the

election, but gave no reasons. Bachowski filed an action against the Secretary, in district court, seeking an order compelling him to file suit. The district court dismissed the case for lack of subject matter jurisdiction. On appeal, we held that the district court did have subject matter jurisdiction and that the scope of judicial review extended to the factual basis for the Secretary's decision not to file suit as well as the factors on which he relied in reaching it. *Bachowski v. Brennan*, 502 F.2d 79, 90 (3d Cir. 1974). On *certiorari*, the Supreme Court agreed that the district court had subject matter jurisdiction and that the Secretary was required to provide "a statement of reasons supporting his determination." *Dunlop v. Bachowski*, 421 U.S. 560, 571 (1975). It held, however, that judicial review "should be confined to examination of the 'reasons' statement, and the determination whether the statement, without more, evinces that the Secretary's decision is so irrational as to constitute the decision arbitrary and capricious." *Id.* at 572-73. On remand, the district court ordered the Secretary to submit a supplemental reasons statement after finding the initial statement inadequate. *Bachowski v. Brennan*, 405 F. Supp. 1227, 1234 (W.D.Pa. 1975). Upon examining the supplemental statement, the district court held that the method the Secretary used to determine whether the alleged violations affected the outcome of the election and, therefore, whether to bring suit, was irrational. It remanded for a recount with directions as to the proper counting method. *Bachowski v. Brennan*, 413 F. Supp. 147, 151 (W.D.Pa. 1976).

On appeal, we held this remand was interlocutory. *Bachowski*, 543 F.2d at 372. Ultimately, the complaint sought an order directing the Secretary to file suit. The district court remanded only for further proceedings. We distinguished "the ultimate substantive issue presented by [the] appeals" from "the final question posed by Mr.

Bachowski's complaint." *Id.* at 372 n.58. "It is the answer to the latter, not the former inquiry that constitutes a final judgment under the traditional test of finality." *Id.* We also said that the issue of the proper method for counting votes might not escape later review. "By way of illustration, if the Secretary, after remand, would continue in his refusal to bring suit, and the district court ordered him to do so, the viability of the mode of review employed by [the court] would be before us on review." *Id.*

#### B.

This case does not present circumstances analogous to the cases in which we held there was appellate jurisdiction. *United Steelworkers* is an example of such a case. We expressly based our holding on the peculiar circumstances of the case. There, the district court's order set aside the decision of a public law board, directed that on remand one member of the board be removed, and further directed the board to remand the case to the railroad for a *de novo* investigative hearing into the termination of one of its employees. *United Steelworkers*, 648 F.2d at 909. In analyzing the order to decide if it was "final" and therefore appealable for purposes of § 1291, we held that it had "the practical effect of dismissing the present litigation" because it "permanently disposed of all findings and orders of the Board." *Id.* at 909, 910. We also concluded that, due to the very limited scope of judicial review over board findings under the Railway Labor Act, the railroad would probably not be able to appeal the Board's order after a remand, thereby precluding any future opportunity to challenge the district court's order. *Id.* at 910. Therefore, "because of the unusual circumstances of [the] case," we found the order final. *Id.* at 911.

*Horizons Int'l, Inc. v. Baldrige*, 811 F.2d 154 (3d Cir. 1987), is another example illustrating the exception to the normal rule of non-appealability. It involved the issuance of a certificate of review<sup>6</sup> by the Secretary of Commerce for a proposed joint venture in the export sale of caustic soda and chlorine. Horizons challenged the issuance of the certificate and moved to limit discovery to the administrative record. The government moved for summary judgment. The district court remanded the case to the Secretary and the Attorney General to consider five specific questions "which raise genuine issues of material fact concerning whether the grant of a certificate of review . . . was arbitrary, capricious, and an abuse of discretion." *Id.* at 158. The five questions necessarily involved material outside of the administrative record. We held this order was final on two grounds. As in *United Steelworkers*, it acted both as a final disposition of the issues on appeal and an effective preclusion of future review. We reasoned that a remand would require further proceedings based on evidence outside of the agency record, thereby mooting the agency's contention that the present record was adequate to support its action. *Id.* at 160. We distinguished this order from an order postponing final disposition where the plaintiff did not yet have a vested interest in obtaining the relief he sought. See e.g., *Bachowski*, 545 F.2d at 363.

In *AJA Associates*, the Army Corps of Engineers (Corps) had denied AJA's application for a dredge-and-fill permit in connection with property it owned in Florida. AJA filed suit to set aside the denial and the Corps moved for summary judgment. The district court held that AJA

<sup>6</sup> A certificate of review provides limited antitrust immunity and must be approved by both the Secretary of Commerce and the Attorney General. See *Horizons International*, 811 F.2d at 157.

was entitled to appear at an "informal oral hearing before a proper agency officer" to respond to the Corps' reasons for denying the permit. *AJA Associates*, 817 F.2d at 1072 (quoting district court order). We said this order was final because the district court's decision "opens up for all applicants the argument, raised after permit denial, that due process requires a hearing in their particular cases." *Id.* at 1073. If the Corps conducted a hearing and either denied or granted a permit, the right-to-hearing issue would have been moot on appeal. *Id.* "[W]hen a district court finally resolves an important legal issue in reviewing an administrative agency action and denial of appellate review before remand to the agency would foreclose appellate review as a practical matter, the remand order is immediately appealable." *Id.*

Likewise, in *United States v. Spears*, 859 F.2d 284 (3d Cir. 1988), we held that a district court order directing a federal agency to comply with a Pennsylvania statute requiring notice before foreclosure proceedings was final. As in *AJA Associates*, the issue would have become moot and escaped review whether or not, on remand, the agency complied and gave the notice. *Spears*, 859 F.2d at 287.

### III.

The Secretary argues that he will be unable to raise the issue of whether a widow's residual functional capacity is relevant to her claim for widow's disability benefits later if we do not exercise appellate jurisdiction over this particular remand order. We rejected the same argument by the Secretary of Labor in *Bachowski* and by Conrail in *Brotherhood of Maintenance of Way Employees v. Consolidated Rail Corp.*, 864 F.2d 283 (3d Cir. 1988). As in *Bachowski*, "it is not inexorably so" that consideration of this issue will escape review.

*Bachowski* is similar in its procedural posture to this case. If the Secretary, after consideration of Mrs. Finkel-

stein's residual functional capacity on remand, persists in refusing benefits and the district court orders that they be granted, the issue of whether residual functional capacity is relevant would be subject to our review. The possibility that it would be unreviewable if the Secretary awards benefits is no different than the possibility in *Bachowski* that the district court's order directing certain vote counting procedures would be unreviewable if the Secretary decided to file suit to set aside the election after utilizing those procedures. Review may become unavailable, but it is not necessarily unavailable, as in *AJA Associates*.

Recently we held that a district court order remanding a railroad employees' discipline case to the National Railroad Adjustment Board "to 'hear evidence as to whether [the employees] were sufficiently responsible for the accidents in question to warrant their dismissal' " was interlocutory. *Brotherhood of Maintenance of Way Employees*, *id.* at 285 (quoting district court order). Although *Brotherhood* is distinguishable on the ground that the Adjustment Board, there the agency, was not a party, we nevertheless relied on the general principle "that district court orders remanding cases to administrative agencies are not final and appealable." *Id.* at 285-286. We did so despite expressing concern over the district court's apparent interference with the arbitration board's power. *Id.* at 289. We distinguished *United Steelworkers* because there the order " 'had the practical effect of dismissing the present litigation and review of the legal questions raised by this appeal will be foreclosed if not permitted now.' " *Id.* at 286 (quoting *United Steelworkers*, 648 F.2d at 909). In discussing *Bachowski*, Judge Sloviter went on to say:

The Secretary and the union appealed the district court's remand order to this court arguing, as Conrail argues here, that if this court did not accept jurisdic-

tion the Secretary "may very well [be] deprive[d] . . . of any opportunity to test the correctness of the scope of review employed by [the district court]." *Id.* at 372. We rejected this argument on the ground that the mode of review used by the district court would be reviewable if the district court later ordered the Secretary to file suit, an issue that remained undecided.

*Id.* Despite the fact that the agency was not a party, *Brotherhood* points up how strongly the finality principle of avoiding piecemeal review pulls in favor of permitting even a decision interfering with other important policies to stand.<sup>7</sup>

Here, too, the ultimate question of whether the district court correctly ordered the Secretary to consider Mrs. Finkelstein's residual functional capacity would become reviewable if the district court orders the Secretary to grant benefits because she is so lacking in residual functional capacity that she cannot engage in any gainful activity. Although the Secretary may be denied review if he orders benefits to be paid upon consideration of Mrs. Finkelstein's residual functional capacity, that possibility is of no more significance than the possible unavailability of review was to Conrail in *Brotherhood of Maintenance of Way Employees*. Of course, if benefits are denied, Mrs. Finkelstein may obtain review.

The principle of finality serves important institutional functions. In serving them, issues which seem burning to the litigants in the course of an individual dispute often disappear, become subsumed in the final decision, and escape review in a particular case. When they involve questions of general significance they are likely to recur in

<sup>7</sup> We recognize the importance of the distinction between our case of *Bachowski* on the one hand and *Brotherhood* on the other. We do not therefore believe *Brotherhood* is controlling, but instead look to *Bachowski*, which we believe does control.

future cases in a posture which does present them for appellate review. Such is this case. It deals with an issue likely to recur in future cases and arises in an administrative procedure strongly analogous to common law adjudication of individual disputes.

The particular district order here at issue is interlocutory, not final. The district court remanded Mrs. Finkelstein's case to the Secretary "for further proceedings." It ordered the Secretary to consider her residual functional capacity before deciding the question of eligibility. This remand concerned the factors for consideration in the adjudicatory process and not, as in *AJA Associates, supra*, only the form that process must take.

Here, as in *Bachowski*, the district court remanded for further consideration according to its guidelines. In *Bachowski*, the guidelines related to the method of vote counting; here, they relate to consideration of residual functional capacity. Unlike the appellant in *Horizons International*, Mrs. Finkelstein has no vested right in anything; the court did not take away something which she had already been given, but postponed final disposition in her case until the Secretary had considered an additional factor. Unlike *AJA Associates*, the district court did not order a hearing when the issue was whether the statute or the regulations required a hearing; instead, it ordered consideration of an additional factor before final administrative adjudication of the benefit issue.

The institutional concerns precluding appellate review of non-final orders prevail and deprive this Court of appellate jurisdiction over the district court's order remanding this case to the agency for consideration of residual functional capacity. The district court's order remanding Mrs. Finkelstein's case to the Secretary for consideration of her residual functional capacity in determining her eligibility for widow's disability benefits is interlocutory, not final. Accordingly, we will dismiss this appeal for lack of appellate jurisdiction.

# APPENDIX B

## UNITED STATES DISTRICT COURT DISTRICT OF NEW JERSEY

CIVIL NO. 85-345 (GEB)

MARILYN FINKELSTEIN, PLAINTIFF

v.

OTIS R. BOWEN, M.D., SECRETARY OF HEALTH AND  
HUMAN SERVICES, DEFENDANT

[Filed Feb. 18, 1988]

### OPINION

BROWN, *District Judge*

Plaintiff, Marilyn Finkelstein, seeks review under § 205(g) of the Social Security Act, as amended, 42 U.S.C. § 405(b), to review a final determination of the Secretary of Health and Human Services (Secretary) which denied plaintiff's application for widow's disability insurance benefits under sections 202(e) and 223 of the Social Security Act, as amended.

#### Standard of Review

A decision of the Administrative Law Judge (ALJ) concerning disability benefits must be upheld by the Court if after review of the record, there is substantial evidence supporting the decision. 42 U.S.C. § 405(g). Substantial evidence has been defined as "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."

*Richardson v. Perales*, 402 U.S. 389, 409 (1971) (citations omitted). This Court is to look at the record as a whole and then determine whether or not there is substantial evidence to support the decision. *Taybron v. Harris*, 667 F.2d 412, 413 (3d Cir. 1981) (quoting *Hess v. Secretary of Health, Education and Welfare*, 497 F.2d 837, 841 (3d Cir. 1974)).

#### Prior Proceedings

Plaintiff initially filed an application for widow's insurance benefits on November 25, 1983. The application was denied on February 3, 1983 and again upon reconsideration on March 28, 1984. On September 12, 1984, a hearing was held before an Administrative Law Judge (ALJ) to review plaintiff's application. The ALJ's decision of September 28, 1984 found the plaintiff to be not a "disabled widow within the meaning of the Social Security Act." This decision became the final decision of the Secretary when the Appeals Council denied plaintiff's request for review on December 11, 1984. The plaintiff then filed a complaint in this Court appealing the ALJ's decision.

#### Evidence Presented

Plaintiff was born on August 11, 1930. She is the widow of a wage earner who died fully insured on August 27, 1980. Plaintiff's physician, Dr. Su, submitted his analysis wherein he states that plaintiff suffers from [sic] frequent chest pain and has a strong family history of coronary heart disease. (Tr. 144-45). Also, he states that plaintiff "has always had an abnormal cardiogram, namely, left ventricular hypertrophy with ST depression of ischemia. Examination revealed hoio systolic murmur at apex suggestive of mitral regurgitation." (*Id.*) The physician con-

cludes that plaintiff suffers from "1) Arteriosclerotic coronary heart disease with coronary insufficiency with recurrent angina, class III B. 2) Mitral valve prolapse syndrome with frequent palpitations." (*Id.*) In a letter dated June 27, 1984, Dr. Su also maintains that "[t]here is no doubt in my mind that Mrs. Finkelstein is totally disabled physically and also requires medical supervision regularly." (Tr. 146-47).

Also before the ALJ were the interrogatories propounded by the ALJ on Dr. Arthur Bauman. Dr. Bauman answered "no" to the following: "In your opinion, does the claimant suffer from an illness or impairment which meets the specific criteria in the Listing of Impairments." In response to the question of whether plaintiff suffers from "an impairment or illness, or combination of impairments or illnesses which is the equivalent of a listed impairment," Dr. Bauman states "possibly but hard data—stress test +/or coronary arteriography absolutely vital. Her treating physician recommended a stress test, but she has thus far refused." (Tr. 161-62).

#### Discussion

A widow may obtain disability benefits if she has a physical or mental impairment that is "of a level of severity which under the regulations prescribed by the Secretary is deemed to be sufficient to preclude an individual from engaging in any gainful activity." 42 U.S.C. § 423(d)(2)(B) (emphasis supplied). "To qualify for widow's disability insurance benefits, [plaintiff] must meet a more stringent standard than that applicable to wage-earner claimants: 'a widow's disability must be sufficiently severe to preclude an individual from engaging in *any* gainful activity, whereas a wage earner's disability need be sufficient to preclude an individual from engaging in *any substantial*

gainful activity.' *Gallagher v. Schweiker*, 697 F.2d 82, 84 n.2 (2d Cir. 1983). Compare 42 U.S.C. § 423(d)(2)(A) with id. 423(d)(2)(B)." *Tolany v. Heckler*, 756 F.2d 268, 269-70 (2d Cir. 1985). "Disability will be found if a widow's impairments have specific clinical findings that are 'the same as those for any impairment' on the listing of impairments in Appendix 1 [20 C.F.R. Part 404, Subpart P, appendix 1] or are 'medically equivalent' to those for any listed impairment." *Id.* at 271.

Plaintiff argues in her brief that, given the two expert medical opinions of Dr. Su and Dr. Bauman, "the ALJ who heard this matter erred in finding that plaintiff did not suffer from an impairment or combination of impairments which was the equivalent of a Listed impairment. It is on this basis that plaintiff submits that the Final Decision of the Secretary is without substantial evidence."

This Court disagrees. As required by *Brewster v. Heckler*, 786 F.2d 581, 585 (3d Cir. 1986), the ALJ made clear on the record his reasons for rejecting the opinion of the treating physician. The ALJ held that:

Dr. Su's statement that the claimant's heart condition is "equal to Ischemic Heart Disease as stated in 4.04 of appendix one [sic]" is conclusory in nature and is unsubstantiated by references to the specific medical signs and findings required by regulation (20 C.F.R. 404.1527-1529). As noted in Social Security Ruling 83-19, an impairment may be judged to be equivalent to a listed impairment only if the medical findings (defined as a set of symptoms, signs, and laboratory findings) are at least equivalent in severity to the set of medical findings for a listed impairment. In no instance will symptoms alone justify a finding of equivalency. Consequently, Dr. Su's statement, standing alone, does not establish equivalency. [Tr. 12].

However, a review of the record under the standards discussed supra however indicates that the case must be remanded to the Secretary for reasons other than those cited by plaintiff. The record is devoid of any findings regarding the functional impact of plaintiff's ailment.

The ALJ found that the "medical findings shown in the medical evidence of record establish the existence of mitral valve prolapse" (Tr: 13); as such, plaintiff may not be able to engage in any activity. As the Second Circuit recently held,

The procedure for widows explains that disability *will be found* if the claimant *has* a listed impairment *or* the equivalent; it does not state that such an impairment is the only basis for meeting the statutory standard. If a claimant has an impairment that is not listed and is not the medical equivalent of a listed impairment, *but the claimant nevertheless is unable to engage in any gainful activity*, it is difficult to see how that person may be denied benefits. It would seem anomalous if an impairment that is only presumed to be disabling because it is listed results in allowance of benefits, yet an impairment that in fact leaves the claimant without the residual functional capacity to engage in any gainful activity is insufficient to warrant benefits.

*Tolany v. Heckler*, 756 F.2d 268, 271 (2d Cir. 1985) (first emphasis in original, second emphasis supplied). See also *Carathers v. Bowen*, No. 85 C-6560, June 17, 1987, Northern District of Illinois (available on Lexis) ("If in fact the ALJ finds that [plaintiff] cannot work, it follows that the combination of her impairments must equal the severity of a listed impairment and that she therefore should receive benefits."); *Williams v. Bowen*, 636 F. Supp. 699, 702-03 (N.D. Ill. (1986) (In reviewing denial of

benefits, Court held, *inter alia*, "plaintiff correctly argues that the ALJ did not consider the functional impact of her hearing loss, i.e., the medically verified limitations on her ability to hear in a normal work environment. Such a consideration is required for the regulatory scheme to have real world meaning.")

As the ALJ made no findings in this regard, the Court remands for further proceedings. The Secretary is directed to inquire whether plaintiff may or may not engage in any gainful activity, as contemplated by the Act.

## APPENDIX C

UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

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 No. 88-5318

MARILYN FINKELSTEIN

v.

 OTIS R. BOWEN, M.D., SECRETARY OF HEALTH AND  
HUMAN SERVICES, APPELLANT

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 (D.C. Civil No. 85-0345)

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 ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW JERSEY

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 [Entered Mar. 3, 1989]

## JUDGMENT

 Present: BECKER, HUTCHINSON and SCIRICA, Circuit  
Judges

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel September 8, 1988.

On consideration of the within appeal from the judgment of the said District Court entered February 19, 1988, it is now here ordered and adjudged by this Court that the appeal is dismissed for lack of appellate

jurisdiction. Costs taxed against the appellant. All of the above in accordance with the opinion of this Court.

ATTEST:  
/s/ Sally Mrvos  
Clerk

Certified as a true copy and issued in lieu of a formal mandate on June 1, 1989

Test: /s/ M. Elizabeth Ferguson  
Chief Deputy Clerk, United States  
Court of Appeals for the Third Circuit

## APPENDIX D

UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

\_\_\_\_\_  
No. 88-5318

MARILYN FINKELSTEIN, APPELLEE

v.

OTIS R. BOWEN, M.D., SECRETARY OF HEALTH AND  
HUMAN SERVICES, APPELLANT

\_\_\_\_\_  
(D.C. Civil Action No. 85-0345)

\_\_\_\_\_  
[Filed May 24, 1989]

SUR PETITION FOR REHEARING

\_\_\_\_\_  
Present: SEITZ, HIGGINBOTHAM, SLOVITER, BECKER,  
STAPLETON, MANSMANN, GREENBERG, HUTCHINSON,  
SCIRICA, COWEN and NYGAARD, Circuit Judges

The petition for rehearing filed by appellant in the above captioned matter having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

Judge Stapleton would grant in banc rehearing and joins in Judge Becker's attached statement.

Judge Becker would grant in banc rehearing for the reasons set forth in his attached Statement Sur Denial of Rehearing In Banc.

Judge Sloviter would grant in banc rehearing and joins in Judge Becker's attached Statement.

By the Court,

/s/ William D Hutchinson

Circuit Judge

DATED: May 24, 1989

# STATEMENT SUR DENIAL OF REHEARING IN BANC

BECKER, Circuit Judge.

I joined in the panel opinion, because I felt bound by our decision in *Bachowski v. Usery*, 545 F.2d 363 (3d Cir. 1976), even though that opinion seems inconsistent at least with the spirit of our later jurisprudence. See *United States v. Spears*, 859 F.2d 284 (3d Cir. 1988); *AJA Associates v. Army Corps of Engineers*, 817 F.2d 1070 (3d Cir. 1987); *Horizons International, Inc. v. Baldrige*, 811 F.2d 154 (3d Cir. 1987). I would hear this case *in banc* and hold that we have appellate jurisdiction, following the rule adopted by the D.C. Circuit in the case of *Occidental Petroleum Corp. v. Securities and Exchange Commission*, No. 87-5279, *slip. op.* at 2-11 (D.C. Cir. April 21, 1989) (D. Ginsburg, J.).

In that case, Judge Ginsburg, speaking for the court, expressed the view that Congress did not intend that the final order rule place an agency in a position of dependence upon the self-interest of others in order to get review of a legal decision that dictates the standards and procedures to be applied by the agency in making its decisions. Here, as in *Occidental*, the Secretary is between the proverbial rock and a hard place. If the Secretary, bound by the district court's opinion, grants benefits on remand to Mrs. Finkelstein, he cannot appeal. If the Secretary does not grant benefits on remand, whether or not the legal issue will be reviewed depends on whether Mrs. Finkelstein decides to press an appeal. The legal issue presented is one of great importance in the administration of the Social Security disability statute and, in practical terms, I do not believe that the government will get this issue decided, at least in the foreseeable future, in the absence of an interlocutory appeal.

I believe that the D.C. Circuit rule is a sensible application of our existing jurisprudence, which provides a narrow exception to the normal rule of non-appealability in cases in which an important legal issue is finally resolved and review of that issue would be foreclosed "as a practical matter" if an immediate appeal were unavailable. See *AJA*, 817 F.2d at 1073. Unfortunately, I read *Bachowski* as foreclosing our applying that rule to this fact pattern, hence my vote for rehearing.

Judge Sloviter and Judge Stapleton agree with this statement.

## APPENDIX E

UNITED STATES DISTRICT COURT  
DISTRICT OF NEW JERSEY

\_\_\_\_\_  
MARILYN FINKELSTEIN, PLAINTIFF

v.

OTIS R. BOWEN, M.D., SECRETARY OF HEALTH AND  
HUMAN SERVICES, DEFENDANT

\_\_\_\_\_  
Civil No. 85-345 (GEB)

\_\_\_\_\_  
ORDER

This matter having come before the Court on appeal of plaintiff pursuant to 42 U.S.C. §§ 405(g) and the Court having considered the record below and the submissions of both parties and for good cause shown

It is on this 16th day of February, 1988

ORDERED that the matter be remanded to the Secretary for further proceedings in accordance with this Court's opinion filed even date herewith.

/s/ Garrett E. Brown, Jr.

GARRETT E. BROWN, JR., U.S.D.J.

(2)  
No. 89-504

Supreme Court  
FILED  
DEC 19 1989

JOSEPH F. ... JR.  
CLERK

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1989

LOUIS W. SULLIVAN, SECRETARY  
OF HEALTH AND HUMAN SERVICES,

*Petitioner,*

v.

MARILYN FINKELSTEIN,

*Respondent.*

ON A PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE THIRD CIRCUIT

**BRIEF IN OPPOSITION TO PETITION  
FOR WRIT OF CERTIORARI**

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December 19, 1989

83/10

**COUNTERSTATEMENT OF THE QUESTION  
PRESENTED BY THE PETITION**

Are there "special and important reasons," as required by Rule 17, for this Court to grant certiorari where, on an appeal by the Secretary of Health and Human Services from a district court's order remanding the case to the Secretary for further proceedings pursuant to 42 U.S.C. § 405(g), the court of appeals applied the "general rule" that remand orders to administrative agencies are not appealable and held that the particular order before it did not warrant application of the "arrow exception to the normal rule"?

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No. 89-504

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In the  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1989

---

LOUIS W. SULLIVAN, SECRETARY  
OF HEALTH AND HUMAN SERVICES,

Petitioner,

v.

MARILYN FINKELSTEIN,

Respondent.

---

ON PETITION FOR A WRIT OF  
CERTIORARI TO THE UNITED STATES COURT  
OF APPEALS FOR THE THIRD CIRCUIT

---

BRIEF IN OPPOSITION TO PETITION  
FOR WRIT OF CERTIORARI

---

## COUNTERSTATEMENT OF THE CASE

This case involves the routine application of the time-honored final judgment rule. The district court remanded this Social Security case to the Secretary of Health and Human Services (the "Secretary") for continued proceedings. Because the order was interlocutory, the court of appeals held it was not immediately appealable. The Secretary advances a number of arguments that would require the abandonment of the final judgment rule in favor of a rule allowing the government -- but not its adversaries -- to invoke the jurisdiction of the courts of appeals virtually at will. For the reasons discussed below, the petition should be denied.

### A. The Course of Proceedings Before the Secretary

On November 25, 1983, Marilyn Finkelstein, a widow suffering a heart ailment, applied to the Department of

Health and Human Services, Social Security Administration (the "SSA") for widow's disability benefits pursuant to the Social Security Act, 42 U.S.C. §§ 301 et seq. (A 14).<sup>1</sup> The SSA denied her application on February 3, 1984, and again upon reconsideration on March 28, 1984. (Id.). On September 28, 1984, an Administrative Law Judge ("ALJ") found, after a hearing, that Mrs. Finkelstein's ailment did not make her a "disabled widow within the meaning of the Social Security Act." (Id.).

Under the Social Security Act, a widow may not obtain disability benefits unless she has a physical or mental impairment "of a level of severity which under regulations prescribed by the

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<sup>1</sup> "A -" refers to the Petitioner's Appendix to his Petition for a Writ of Certiorari. The court of appeals' opinion, filed March 3, 1989, appears in the Appendix at pages 1-12; the district court's opinion, filed February 19, 1988, appears at pages 13-18. The Secretary's Petition is cited as "Pet."

Secretary is deemed to be sufficient to preclude an individual from engaging in any gainful activity." 42 U.S.C.

§ 423(d)(2)(B). The Secretary's regulations similarly provide that the widow's physical or mental impairments "must be of a level of severity to prevent a person from doing any gainful activity." 20 C.F.R. § 404.1577.

The ALJ rejected Mrs. Finkelstein's claim for benefits because he found that the evidence did not establish that her heart condition was "equivalent" to ischemic heart disease, one of the cardiovascular impairments listed in Appendix 1 to 20 C.F.R. Part 404, Subpart P. (A 16). The ALJ did not make any findings on whether Mrs. Finkelstein's impairment is "of a level of severity to prevent a person from doing any gainful" activity under 20 C.F.R. § 404.1577. (A 17). The ALJ's decision denying Mrs. Finkelstein

benefits became the final decision of the Secretary when the Appeals Council denied Mrs. Finkelstein's request for review on December 11, 1984. (A 14).

B. The Proceedings in the District Court

Mrs. Finkelstein filed suit in the United States District Court for the District of New Jersey, pursuant to Section 205(g) of the Social Security Act, 42 U.S.C. § 405(g) ("Section 205(g)"), for review of the Secretary's decision. (A 13). The district court correctly observed that it is required by Section 205(g) to uphold the ALJ's decision "if after review of the record there is substantial evidence supporting the decision." (A 13). The court noted that the ALJ properly "made clear on the record his reasons" for finding that Mrs. Finkelstein did not suffer from an impairment or combination of impairments which was the equivalent of a Listed

Impairment. (A 16). The district court held, however, that the SSA must consider the "functional impact" of the claimant's impairment in determining whether it precludes her from "engaging in any gainful activity" with in the meaning of 42 U.S.C. § 423(d)(2)(B) and 20 C.F.R. § 404.1577.<sup>2</sup> Because the record was "devoid of any findings regarding the functional impact" of Mrs. Finkelstein's heart ailment (A 17), the district court held that the case must be remanded to the Secretary for further proceedings for the ALJ "to inquire whether plaintiff may or may not engage in any gainful activity, as contemplated by the [Social Security] Act." (A 18). The district

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<sup>2</sup> The district court's decision that the Secretary must consider a claimant's residual functional capacity was consistent with cases decided by other courts. E.g., Kier v. Sullivan, No. 89-6095, to be reported at 888 F.2d 244 (2d Cir. October 23, 1989); Tolany v. Heckler, 756 F.2d 268, 271 (2d Cir. 1985); Marcus v. Bowen, 696 F. Supp. 364, 379-80 (N.D. Ill. 1988).

court therefore remanded the case "for good cause shown." (A 25).

C. The Proceedings in the Court of Appeals

The Secretary appealed the district court's remand order, contending that the statute and applicable regulations permit the ALJ to look only to whether a claimant's impairment meets or equals an impairment listed in the appendix to Subpart P of 20 C.F.R. Part 404 and do not require him to make the inquiry ordered by the district court. (A 2-3).

The court of appeals dismissed the appeal for lack of appellate jurisdiction. (A 19-20). The court first observed that remands to administrative agencies are not ordinarily appealable under 28 U.S.C. § 1291 because a remand order is "typically an interlocutory step in the adjudicative process and, therefore, not

a final order." (A 4). The court also discussed the "narrow exception to the normal rule of non-appealability . . . limited to cases in which an important legal issue is finally resolved and review of that issue would be foreclosed 'as a practical matter' if an immediate appeal were unavailable." (A 4-5).

The court of appeals held that "the particular district order" was "interlocutory, not final," because the district court "ordered consideration of an additional factor before final administrative adjudication of the benefit issue." (A 12). In rejecting the Secretary's invocation of the collateral order doctrine, the court of appeals found its decision in Bachowski v. Usery, 545 F.2d 363, 373-74 (3d Cir. 1976) (quoted with approval in Richardson-Merrell, Inc. v. Koller,

472 U.S. 424, 440 (1985)), to be controlling. (A 11 n.7).

The court of appeals denied the Secretary's petition for rehearing and rehearing in banc, with three of eleven judges voting to hold a rehearing in banc, on the basis of a desire to consider applying the collateral order doctrine, recently articulated in Occidental Petroleum Corp. v. SEC, 873 F.2d 325, 328-32 (D.C. Cir. 1989), to the facts of this case. (A 21-24).

**SUMMARY OF REASONS FOR DENYING THE  
PETITION FOR WRIT OF CERTIORARI**

This Court should deny the Secretary's certiorari petition for at least three reasons.

First, there was nothing about the court of appeals' decision that warrants review. The court applied well-settled principles of appellate jurisdiction to the specific interlocutory order before

it -- a remand order directing the Secretary to consider another factor in determining Mrs. Finkelstein's eligibility for Social Security benefits. The court carefully considered and properly rejected the Secretary's argument that "an important legal issue [was] finally resolved [in the district court] and review of that issue would be foreclosed" if immediate appeal were unavailable. (Part I, infra).

Second, the principles applied by the Third Circuit in this case are entirely consonant with the decisions of other appellate courts, including the Fifth Circuit's decision in Cohen v. Perales, 412 F.2d 44 (5th Cir. 1969), rev'd sub nom. Richardson v. Perales, 402 U.S. 389 (1971) (relied on by the Secretary to demonstrate the existence of a conflict). Those courts -- along with the Third Circuit -- have fashioned a set of principles guided by those laid down

by this court in Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 546-47 (1949), and its progeny. Simply put, there is no conflict among the circuits. (Part II, infra).

Third, the Secretary's petition invites this Court to abandon principled concepts of finality and permit the government -- but only the government -- to appeal an adverse interlocutory district court remand. Such a new, lopsided rule would make piecemeal appellate adjudication of administrative proceedings routine and would work considerable inequity on applicants for Social Security benefits. (Part III, infra).

REASONS FOR DENYING THE PETITION  
FOR WRIT OF CERTIORARI

I. THE COURT OF APPEALS' HOLDING  
DOES NOT WARRANT REVIEW BY  
THIS COURT.

A. The Court of Appeals Properly  
Applied the Final Judgment Rule.

The reasons for the final judgment rule, both practical and equitable, have been articulated repeatedly by this Court. First, "[t]he finality requirement in Section 1291 evinces a legislative judgment that '[r]estricting appellate review to "final decisions" prevents the debilitating effect on judicial administration caused by piecemeal appellate disposition of what is, in practical consequence, but a single controversy.'" Coopers & Lybrand v. Livesay, 437 U.S. 463, 471 (1978) (quoting Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 170 (1974)).

In addition, "[r]easons other than the conservation of judicial energy sustain the limitation. One is the elimination of delays caused by interlocutory appeals." Catlin v. United States, 324 U.S. 229, 233-34 (1945); accord, Van Cauwenberghe v. Biard, 108 S. Ct. 1945, 1949 n.3 (1988) ("avoid[ing] the obstruction to just claims that would come from permitting the harassment and cost of a succession of separate appeals"); Cobbledick v. United States, 309 U.S. 323, 325 (1940) ("to be effective, judicial administration must not be leaden-footed").

Finally, "[p]ermitting piecemeal appeals would undermine the independence of the district judge, as well as the special role that individual plays in our judicial system." Van Cauwenberghe v. Biard, 108 S. Ct. at 1949 n.8 (quoting Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 374 (1981)).

For these reasons, the courts of appeals have "uniformly held that as a general rule, a [district court's] remand order [to an administrative agency] is 'interlocutory' rather than 'final,' and thus may not be appealed immediately (unless, of course, it is certified pursuant to § 1292)." Occidental Petroleum Corp. v. SEC, 873 F.2d at 329 (D.C. Cir. 1989) (collecting cases). This "general rule" is so well recognized that earlier this year the Secretary conceded "that, ordinarily, a remand order is not a final decision of the district court, as that term is construed pursuant to 28 U.S.C. § 1291, and thus provides no basis for our assertion of jurisdiction." Colon v. Secretary of Health and Human Services, 877 F.2d 148, 151 (1st Cir. 1989) (emphasis/added) (cited by the Secretary, Pet. at 23).<sup>3</sup>

<sup>3</sup> Indeed, the Secretary has expressly taken this position and won in circuit

The district court's order in this case was a typical interlocutory remand, requiring "the consideration [by the Secretary] of an additional factor before final administrative adjudication" could take place. (A 12). It was a step in the process of administering the claim. In no way had there been "a decision by the district court that 'ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.'" Van Cauwenberghe v. Biard, 108 S. Ct. at 1948 (quoting Catlin v. United States, 324 U.S. at 233).

As Justice (then Circuit Judge) Blackmun explained in holding that a

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after circuit. See, e.g., Memorial Hospital Sys. v. Heckler, 769 F.2d 1043, 1044 (5th Cir. 1985); Farr v. Heckler, 729 F.2d 1426, 1427 (11th Cir. 1984); Howell v. Schweiker, 699 F.2d 524, 525 (11th Cir. 1983); Gilcrist v. Schweiker, 645 F.2d 818, 819 (9th Cir. 1981); Dalto v. Richardson, 434 F.2d 1018, 1019 (2d Cir. 1970), cert. denied, 401 U.S. 979 (1971); Bohms v. Gardner, 381 F.2d 283, 285 (8th Cir. 1967) (Blackmun, J.), cert. denied, 390 U.S. 964 (1968).

remand to the Secretary for further proceedings is not immediately appealable, Bohms v. Gardner, 381 F.2d at 285,

The district court merely vacated the Secretary's decision and remanded the case for reconsideration and, possibly, the reception of additional evidence. It neither granted nor denied the relief the claimant seeks. The adverse agency decision so vacated may of course be reinstated in due course but it may go the other way. Until the Secretary acts on the remand we have no insight as to what his eventual decision will be.

Accord, Tookes v. Harris, No. 79-3340, 614 F.2d 1296 (table) (5th Cir. March 25, 1980) (reported as an appendix to the opinion in Howell v. Schweiker, 699 F.2d at 527, 528 (the district court's "specific questions [for consideration of an additional factor on remand] indicate that the present decision is but a step toward the final judgement"); Dalto v. Richardson, 434 F.2d at 1018-19 (remand "for the taking of additional evidence" was "an interlocutory order and not

appealable"); Gilcrist v. Schweiker, 645 F.2d at 819.

B. The Court of Appeals Properly Held That This Case Did Not Warrant Application of the "Narrow Exception" to the Final Judgment Rule for Certain Collateral Orders.

The policy of finality "has been departed from only when observance of it would practically defeat the right to any review at all." Cobbledick v. United States, 309 U.S. at 324. This Court carved out a limited exception to the final judgment rule in Cohen v. Beneficial Industrial Loan Corp., 337 U.S. at 546, for a "small class of cases which finally determine claims of right separate from, and collateral to, rights asserted in the action." In order that the exception not swallow the rule, this Court has repeatedly held that a collateral order must be "considered 'effectively unreviewable' absent

immediate appeal" in order to be appealable. Firestone Tire & Rubber Co. v. Risjord, 449 U.S. at 376 ("to be appealable as a final collateral order, the challenged order must constitute 'a complete, formal and, in the trial court, final rejection,' Abney v. United States, 431 U.S. 651, 659 (1977), of a claimed right 'where denial of immediate review would render impossible any review whatsoever.' United States v. Ryan, 402 U.S. 530, 533 (1971)."); accord, Stringfellow v. Concerned Neighbors in Action, 480 U.S. 370, 376 (1987); Richardson-Merrell, Inc. v. Koller, 472 U.S. at 430-31.

This Court has thus held that "to come within the collateral order doctrine articulated in Cohen, the order must satisfy each of three conditions: it must (1) 'conclusively determine the disputed question,' (2) 'resolve an important issue completely separate from the merits

of the action,' and (3) 'be effectively unreviewable on appeal from a final judgment.' Van Cauwenberghe v. Biard, 108 S. Ct. at 1949 (quoting Coopers & Lybrand v. Livesay, 437 U.S. at 468).

The principles articulated in Cohen and its progeny have been applied by the courts of appeals to find appellate jurisdiction in a limited class of appeals from district court remands to administrative agencies. E.g., Occidental Petroleum Corp. v. SEC, 873 F.2d at 332 ("the SEC . . . will not be able to appeal its own decision"); Stone v. Heckler, 722 F.2d 464, 467 (9th Cir. 1983); Cohen v. Perales, 412 F.2d at 48 ("[u]nless the Secretary is allowed to appeal from this order, he will never be able to reach the questions involved"). And -- as in this case -- the courts of appeals have regularly rejected requests to find jurisdiction under the collateral order doctrine where its application was

not warranted. E.g., Copeland v. Bowen, 861 F.2d 536, 539 (9th Cir. 1988); Harper v. Bowen, 854 F.2d 678, 681 (4th Cir. 1988); Farr v. Heckler, 729 F.2d at 1427; Howell v. Schweiker, 699 F.2d at 526; Bachowski v. Usery, 545 F.2d at 372.

In this case, the court of appeals correctly applied these principles to the order before it, holding that this case does not fall within the "narrow exception" to the final judgement rule. That conclusion was correct for at least four reasons.

1. The District Court's Remand Order Did Not Resolve "An Important Issue Completely Separate From the Merits of the Action."

This requirement, set out in the second part of the test articulated by this Court in Coopers & Lybrand v. Livesay, 437 U.S. at 468, defeats the use of the collateral order doctrine in this case. Far from being "completely

separate from the merits," the district court's order is both procedurally and factually integrated with the ultimate resolution of Mrs. Finkelstein's claim for benefits. Indeed, the Secretary concedes as much in his petition but urges the Court to disregard this defect. (Pet. at 16 n.9).

(a) The District Judge Plays an Integral Role in the Administrative Process Under Section 205(g).

Once a claim has been processed administratively, it may be reviewed by the district court pursuant to Section 205(g), which provides in pertinent part,

Any individual, after any final decision of the Secretary made after a hearing to which he was a party . . . may obtain a review of such decision by civil action . . . brought in the district court . . . .

The court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Secretary, with or without

remanding the cause for a rehearing . . . .

The court may, on motion of the Secretary made for good cause shown before he files his answer, remand the case to the Secretary for further action by the Secretary, and it may at any time order additional evidence to be taken before the Secretary but only on a showing that there is good cause for the failure to incorporate such evidence into the record in prior proceedings; and the Secretary shall, after the case is remanded, and after hearing such additional evidence if so ordered, modify or affirm his findings of fact or his decision, or both, and shall file with the court any such additional and modified findings of fact and decision, and a transcript of the additional record and testimony upon which his action in modifying or affirming was based.

The Secretary's attempt to minimize the district judge's role (Pet. at 16 n.9) ignores the intricacies of the statutory scheme. This Court has observed that these "detailed provisions for the transfer of proceedings" back and forth between the district courts and the SSA "suggest a degree of direct interaction between a federal court and an

administrative agency alien to traditional review of agency action under the Administrative Procedure Act." Sullivan v. Hudson, 109 S. Ct. 2248, 2254 (1989). The unusual nature of Section 205(g) places the district courts "virtually as coparticipants in the process, exercising ground-level discretion of the same order as that exercised by ALJs and the Appeals Council . . . ." Id. (quoting J. Mashaw, et al., Social Security Hearings and Appeals 133 (1978)).

What allows for such interaction is the provision providing that the district court "may at any time order additional evidence to be taken before the Secretary" provided that the requisite "good cause" is shown. In fact, remands are the most common of all dispositions of Social Security cases by the district courts. See Division of Appellate Assessment of the Off. of

Policy & Procedures, Soc. Sec. Admin.

Off. of Hearings & Appeals, Court

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(December 1987). To be sure, there are cases where the claim for benefits has been finally adjudicated. Those cases are distinguished by an order of the district court finally disposing of the cause pursuant to that part of Section 205(g) granting the district court the power to affirm, modify or reverse the decision of the Secretary, with or without remanding the cause for a rehearing. See Tookes v. Harris, 699 F.2d at 528-29 (explaining the differences between the types of remand and the effect of those differences on appealability); Cohen v. Perales, 412 F.2d at 48 (same); see also pp. 25-27, 50-53, infra.

(b) The District Court's Order  
in This Case Was Factually Integrated  
with the Ultimate Resolution of the Case.

Here, the district court concluded that the Secretary failed to consider a necessary factor and remanded the case for further proceedings -- for the taking of more evidence -- not for a rehearing. The district court's order simply did not affirm, modify or reverse that of the secretary.

As other courts of appeals have held in precisely this situation, no final adjudication of the claim has taken place. For example, in Tookes v. Harris, the ALJ had made findings on the claimant's impairment, but failed to consider whether substantial gainful activity was available for the claimant in his locality. Id., 699 F.2d at 527-28. The district court, having acknowledged that its role was limited by Section 205(g) to determining whether

substantial evidence on the record as a whole existed to support the Secretary's determination, remanded for the consideration of the additional factor. On facts strikingly similar to those presented to the court of appeals in this case, the Tookes court -- like the Bachowski court -- distinguished Cohen v. Perales, 412 F.2d at 48, and dismissed the appeal.

The Tookes court explained the district judge's options under Section 205(g):

A district judge can remand a case to the Secretary in three situations. 42 U.S.C. § 405(g) (1976). First, the court can remand for rehearing as part of its judgment affirming, modifying, or reversing the Secretary's decision. Second, the court can remand if the Secretary moves for remand before she files an answer. Third, the court "may, at any time, on good cause shown, order additional evidence." Id.

Tookes, 699 F.2d at 528. In applying the principles of Cohen and Perales to the order, the Tookes court held that because

the particular order fell into the third category -- an "order" to take "additional evidence" -- it was not appealable. "Not only was the remand not for 'rehearing' as the statute provides, but the [district] court's specific questions indicate that the present decision is but a step toward the final judgment. Review at this time would be intervention in an open, unfinished, and inconclusive matter." Accord, Copeland v. Bowen, 861 F.2d at 539 (remand "for the taking of additional evidence" was "an interlocutory order and not appealable"); Dalto v. Richardson, 434 F.2d at 1018-19 (same).

Like the district court in Tookes, the district court here remanded the case "for good cause shown," not for a "rehearing." (A 25).

2. The District Court's Remand Order May Be Reviewed at the Conclusion of All Proceedings in the District Court.

The Order at issue in this case does not meet the third requirement articulated in Coopers & Lybrand v. Livesay, 437 U.S. at 468, that the order must "be effectively unreviewable on appeal from a final judgment." If necessary, the district court's order may be reviewed whether or not the Secretary, after taking further evidence, grants Mrs. Finkelstein the benefits she seeks.

The Secretary contends that if he awards benefits on remand, he might "not have an effective opportunity for appellate review" of the order at issue here. (Pet. at 16-17 & n.10). The Secretary is wrong.

The action has not been dismissed. No judgment has been entered. Instead, according to the district court's order, "for good cause shown," the matter has

been "remanded to the Secretary for further proceedings." (A 25). Pursuant to Section 205(g), the Secretary must now either "modify or affirm his findings of fact or his decision or both." Whether the Secretary modifies or affirms his decision considering Mrs. Finkelstein's capacity to do "any gainful activity," he is required to file "any such . . . decision" with the district court, and the district court may then enter "judgment affirming, modifying or reversing the Secretary's judgment." The language of the statute is mandatory. 42 U.S.C. § 405(g).

This clearly gives the Secretary the opportunity for effective appellate review after the conclusion of all the proceedings in the district court. As this Court explained last term, "the procedure set forth in 42 U.S.C. § 405(g) contemplates additional action both by the Secretary and a district court before

a civil action is concluded following a remand." Sullivan v. Hudson, 109 S. Ct. at 2255 (quoting Guthrie v. Schweiker, 718 F.2d 104, 106 (4th Cir. 1983)). For that reason, "there will often be no final judgment in a claimant's civil action for judicial review until the administrative proceedings on remand are complete." Id., 109 S. Ct. at 2255.

This Court's discussion of these procedures in Sullivan v. Hudson is consistent with Congress' explanation of the application of the Equal Access to Justice Act ("EAJA") to Section 205(g) cases:

[A]fter the HHS review upon remand the agency must file its findings with the reviewing court. Thus the remand decision is not a "final judgment," nor is the agency decision after remand. Instead, the District Court should enter an order affirming, modifying, or reversing the final HHS decision, and this will usually be the final judgment that

starts [the EAJA's] 30 days running.

H. Rep. No. 120, 99th Cong., 1st Sess. 19, reprinted in 1985 U.S. Code Cong. & Admin. New 132, 148.

There is thus no question that, as the Secretary has represented to the Third Circuit, he "must" and "will" "return to the district court and file a copy of the government's decision upon conclusion of any remand proceeding in which a claimant receives benefits." Brown v. Secretary of Health and Human Services, 747 F.2d 878, 884 (3d Cir. 1984) (emphasis in original).<sup>4</sup>

Against all this, the Secretary makes the unsupported assertion that "nothing in 42 U.S.C. 405(g) requires the Secretary, after a remand based on legal error in the Secretary's first decision,

<sup>4</sup> The Secretary has followed such a procedure after remand in courts outside the Third Circuit as well. E.g., Miles v. Bowen, 632 F. Supp. 282, 283 (M.D. Ala. 1986).

to file with the district court a new decision in favor of the claimant." (Pet. at 17 n.10). That assertion is, in any event, irrelevant. Even if the statutory language is not considered mandatory, the Secretary cannot deny that he is, at the least, permitted to file such a decision and move the district court to "affirm . . . the decision" pursuant to Section 205(g).

After the district court's final judgment is entered, the Secretary may then appeal the adverse collateral remand order. "In an appropriate case, appeal may be permitted from an adverse ruling collateral to the judgment on the merits at the behest of the party who has prevailed on the merits, so long as that party retains a stake in the appeal satisfying the requirements of Article III." Deposit Guaranty National Bank v. Roper, 445 U.S. 326, 334 (1980). Indeed, this has been held to be the

appropriate procedure by more than one court in the Social Security context. Copeland v. Bowen, 861 F.2d at 539 (appeal of district court's remand order is to be taken after new decision by Secretary and affirmance by district court of Secretary's decision); Barfield v. Weinberger, 485 F.2d 696, 698 (5th Cir. 1973) (holding that Secretary may not appeal remand immediately); see also Harper v. Bowen, 854 F.2d at 681; Taylor v. Heckler, 778 F.2d 674, 677 n.2 (11th Cir. 1985); Brown v. Secretary of Health & Human Services, 747 F.2d at 883-85.

3. Nothing Renders This Order Effectively Unreviewable Absent Immediate Appeal.

Even if the Secretary were correct that he may in some circumstances be precluded from ultimately seeking review of this order -- and he is not -- that is no reason to allow an appeal now. The court of appeals correctly held that "it

is not inexorably so' that consideration of this issue will escape review."

(A 9). Indeed, the Secretary does not deny that his right to appeal will not be "irretrievably lost." He complains only that he "may not have an effective opportunity for appellate review." (Pet. at 16) (emphasis added). But the final judgment rule is not so pliable. As this Court has held, "the final judgment rule requires that except in certain narrow circumstances in which the right would be 'irretrievably lost' absent an immediate appeal, Richardson-Merrill Inc. v. Koller, 472 U.S. 424, 431 (1985), litigants must abide by the district court's judgments, and suffer the concomitant burden of a trial, until the end of the proceedings before gaining appellate review." Van Cauwenberghe v. Biard, 108 S. Ct. at 1950 (emphasis added).

There is no institutional interest that would be served by the alteration of this standard in the context of the Secretary's attempts to appeal cases brought under Section 205(g). As the court of appeals correctly predicted (A 11-12), other opportunities for appellate consideration of this issue arose. See cases cited p. 6 n.2, supra. Moreover, as Professor Wright has explained in his criticism of Cohen v. Perales, "[t]he interest of an institutional litigant in settling questions of law is apparent, but it seems a slender reed for immediate appeal." 15 C. Wright, A. Miller & E. Cooper, Federal Practice & Procedure § 3914 at 551-52 n.43 (1976). That criticism is particularly penetrating when it concerns an agency that does not consider the holdings of district court decisions to be binding in the

adjudication of future cases.<sup>5</sup> The Secretary's desire, therefore, for quick appellate review of a district court decision applying a legal standard with which he disagrees is somewhat curious, and the institutional interests he puts forward (Pet. 15-18) should not be considered compelling.

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<sup>5</sup> Decisions by the district courts containing "interpretations of the law, regulations, or rulings which are inconsistent with the Secretary's interpretation" have never been considered by the ALJs as "binding on future cases simply because the case is not appealed." J. Mashaw, Social Security Hearings & Appeals at 141. Only in recent years has the SSA even begun to consider acquiescing -- in some limited circumstances -- to decisions of the courts of appeals. See Proposed Regulations Concerning Application of Circuit Court Law, 53 Fed. Reg. 46628 (1988) (proposing amendments to 20 C.F.R. Parts 404, 410, 416 and 422 that would implement regulations acquiescing to decisions of courts of appeals only).

4. The Secretary Could Have Requested an Appeal Pursuant to 28 U.S.C. § 1292(b).

Congress has, by enacting 28 U.S.C. § 1292(b), provided a process for discretionary appellate consideration of "an order [that] involves a controlling question of law as to which there is substantial ground for difference of opinion" where "an immediate appeal from the order may advance the ultimate termination of the litigation." Id. The district court's order involved a controlling question of law with which the Secretary disagreed. A reversal by the court of appeals would have terminated the litigation. Thus, this case could have been eligible for certification and appeal pursuant to Section 1292(b). But rather than pursue this method of appellate review, the Secretary attempted to invoke the collateral order doctrine. The

availability of Section 1292(b) as an avenue of review of remands to administrative agencies in appropriate cases provides sufficient relief for the Secretary without requiring this Court to create a new rule of appellate jurisdiction. The Secretary's failure to pursue an appeal under Section 1292(b) further supports the court of appeals' conclusion that it had no appellate jurisdiction. Van Cauwenberghe v. Biard, 108 S. Ct. at 1953-54; Bachowski v. Utery, 545 F.2d at 373; Barfield v. Weinberger, 485 F.2d at 697.

C. The Secretary's Argument That This Order is Effectively an Injunction Appealable Pursuant to 28 U.S.C. § 1292(a)(1) Should Not Be Heard and Is of No Merit.

The Secretary briefly raises in his Petition an assertion that the court of appeals had jurisdiction pursuant to 28 U.S.C. § 1292(a)(1) because the remand

order "had the effect of granting an injunction." (Pet. at 18). That novel theory was not raised in the court of appeals and should not be heard here.<sup>6</sup>

"This Court usually will decline to consider questions presented in a petition for certiorari that have not been considered by the lower court."

Patrick v. Burget, 108 S. Ct. 1658, 1662 n.5 (1988).

In addition, the entire premise of the Secretary's theory -- that the order "granted partial relief on the merits and ordered further proceedings in a different forum" (Pet. at 19) -- completely ignores the teachings of this Court in Sullivan v. Hudson, 109 S. Ct. at 2254-55. As this Court has observed,

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<sup>6</sup> Nor did the Secretary make any request in the court of appeals, or indeed in this Court, for expedited consideration of the case pursuant to 28 U.S.C. § 1657, which requires such consideration for "any action for temporary or preliminary injunctive relief."

Section 205(g) calls for extensive interaction between the district court and the administrative agency. Moreover, if the Secretary were correct, every remand to every administrative agency would be appealable by any party under 28 U.S.C. § 1292(a)(1). That has never been the law.

Finally, even if the Secretary were correct that the district court's remand is effectively an injunction, he still has not met the additional requirements necessary for immediate review or orders having the "practical effect" of granting or denying an injunction: "a party seeking review [of such an order] also must show that the order will have a "serious, perhaps irreparable consequence," and that the order can be "effectually challenged" only by an immediate appeal."

Stringfellow v. Concerned Neighbors in Action, 480 U.S. at 379 (quoting Carson

v. American Brands, Inc., 450 U.S. 79, 84 (1981), quoting, in turn, Baltimore Contractors, Inc. v. Bodinger, 348 U.S. 176, 181 (1955)); I.A.M. Nat'l Pension Fund Benefit Plan A v. Cooper Indus., 789 F.2d 21, 24 & n.3 (D.C. Cir.) (cited in the Secretary's Pet. at 19 n.11) cert. denied, 479 U.S. 971 (1986).<sup>7</sup>

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<sup>7</sup> Footnote three of the I.A.M. case, cited by the Secretary for the proposition that such a showing is not required "in all circumstances" (Pet. at 19 n.11), identifies a clearly irrelevant exception. Also, Cohen v. Board of Trustees of University of Medicine & Dentistry, 867 F.2d 1455, 1468 (3d Cir. 1989), the only other case cited by the Secretary for that proposition (Pet. at 19 n.11), is of no application here. It held only that "when an injunction is specifically applied for and granted, the party enjoined [need not] show . . . irreparable injury beyond that resulting from the availability of pendent lite enforcement by contempt in order to appeal under Section 1292(a)(1)."

II. THERE IS NO CONFLICT AMONG THE CIRCUITS.

Placing primary reliance on a case decided by the Fifth Circuit in 1969, the Secretary asserts that "[t]he jurisdictional ruling by the Third Circuit in this case conflicts not only with the decision in [Cohen v. Perales, 412 F.2d at 48,] but also with the decisions of . . . the First, Sixth, [Seventh], Ninth and Tenth Circuits," (Pet. at 23).<sup>8</sup> There is no conflict among the circuits for the following four reasons: (1) no court is in direct conflict with the Third Circuit's decision in this case; (2) the Perales court applied the same principles as did the court of appeals here; (3) Perales is clearly

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<sup>8</sup> The alleged departure of certain panels from their "own contrary precedent" (Pet. at 24) is an intramural matter to be resolved by the courts of appeals themselves. See Davis v. United States, 417 U.S. 333, 340 (1974).

distinguishable; and (4) Perales is of questionable vitality.

A. No Court Is In Conflict With The Third Circuit.

The Secretary points to no case that is expressly in conflict with the Third Circuit's decision in this case, and we have found none. It should be no surprise that various courts, in applying the same fact-specific inquiry to different facts, have reached different -- but not inconsistent -- outcomes. Indeed, each of the courts pointed to by the Secretary as being "in conflict" with the Third Circuit (i.e. the First, Fifth, Sixth, Seventh, Ninth and Tenth) has "not followed" (in the words of the Secretary) Perales when the remand order being appealed from is not appealable. See, e.g., Copeland v. Bowen, 861 F.2d at 539 (9th Cir. 1988) (district court's remand "for further evaluation" not immediately appealable as final or collateral order);

Mall Properties, Inc. v. Marsh, 841 F.2d 440, 443 (1st Cir. 1988) ("the crucial distinction in these cases is not -- as [appellant] would contend -- simply the fact that the district court imposed a new or unsettled legal standard on the agency, but rather that unless review were accorded immediately, the agency likely would not be able to obtain review"), cert. denied, 109 S. Ct. 128 (1988).<sup>9</sup> None of these courts has pointed to the nature of the appellant as a ground for granting or denying appellate review. Indeed, the Mall Properties court expressly rejected that notion. 841 F.2d at 443.

<sup>9</sup> Accord Loffland Bros. Co. v. Rougeau, 655 F.2d 1031, 1032 (10th Cir. 1981) (district court's decision to remand was neither final nor appealable collateral order); Tookes v. Harris, 699 F.2d at 527 (5th Cir. 1980) (same, distinguishing Perales); Whitehead v. Califano, 596 F.2d 1315, 1319 & n.2 (6th Cir. 1979); United Transportation Union v. Illinois C. R.R., 433 F.2d 566, 568 (7th Cir. 1970).

Instead of "following" or "not following" Perales, the courts have consistently applied the principles of Cohen to appeals from district court remands to administrative agencies. The decision in Occidental Petroleum Corp. v. SEC, 873 F.2d at 328-32, illustrates the differences between the case at hand and those in which courts of appeals have found remands to be appealable under the collateral order doctrine. That case involved a request under the Freedom of Information Act, 5 U.S.C. § 552 ("FOIA"), for documents that Occidental had provided to the SEC during the course of an investigation. After both Occidental and the FOIA requestor had had an opportunity to set out their positions to the FOIA officer, the SEC determined to release the documents. See 17 C.F.R. § 200.83. When Occidental sought to enjoin the documents' release, the district court concluded that the

administrative record was "inadequate for judicial review under the Administrative Procedure Act" and remanded the case to the SEC for further proceedings. 873 F.2d at 328. In holding that the district court's collateral remand order met all three of the Coopers & Lybrand v. Livesay requirements, the Occidental Petroleum court placed special emphasis on the fact that the central question at issue was "whether the district court correctly placed upon the SEC the burden of substantiating its determination." 873 F.2d at 332. This was because the SEC itself had no interest in the outcome of its decision to grant or deny confidentiality and no method to challenge the district court's rejection of its procedures. "Whether the SEC ultimately rules for disclosure or for confidential treatment of any particular document, it will not be able to appeal its own decision. Only Occidental or the

FOIA requestor, whichever is aggrieved, will be able to pursue the matter back to the district court and thence to this court." Id. (emphasis added).

Other cases relied upon by the Secretary (Pet. at 23-24) also demonstrate that a disparity in outcomes is not a conflict among the circuits. Those cases applied the test outlined in Cohen to different factual situations -- situations where the courts found that the Cohen test was met because the district court order concerned a claim that was completely separate from the merits and effectively unreviewable absent immediate appeal. Some of those cases involved, for instance, the jurisdiction of the district court to issue any order at all. E.g., Colon v. Secretary of Health and Human Services, 877 F.2d at 151 (issue of district court's jurisdiction immediately appealable under "Cohen exception to the

finality requirement"); Ensey v. Richardson, 469 F.2d 664, 666 (9th Cir. 1972) (same); Edgewater Hospital, Inc. v. Bowen, 857 F.2d 1123, 1129 (7th Cir. 1988) (concluding that district court did not "remand" but "finally determined the specific issue of jurisdiction and returned the case to the [Provider Reimbursement Review Board]"). Others involved the order of a district court to redetermine the claim under a new evidentiary standard. E.g., Pickett v. Bowen, 833 F.2d 286, 290-91 (11th Cir. 1987) (applying Cohen and concluding that redetermination of claim would render Secretary's "present objection moot and judicial review meaningless"); Huie v. Bowen, 788 F.2d 698, 703 (11th Cir. 1986) (applying Cohen and concluding that all three factors are met: "the fundamental legal issue . . . will become moot. Thus, review at another time will be meaningless."); Stone v. Heckler, 722

F.2d at 466-68 (collateral evidentiary ruling appealable under Cohen). Others arose in contexts other than Section 205(g). E.g., Occidental Petroleum Corp. v. SEC, 873 F.2d at 328-32; Bender v. Clark, 744 F.2d 1424, 1428 (10th Cir. 1984) (expressly departing from Cohen but finding appellate jurisdiction because the Bureau of Land Management "has no avenue for obtaining judicial review of its own administrative decisions" under the Mineral Leasing Act, 30 U.S.C. § 226(b)(1)).

Finally, the Secretary points to what Professor Wright has termed a "small number of decisions [that] have allowed appeals without extended discussion," 15 C. Wright, A. Miller & E. Cooper, Federal Practice & Procedure § 3914 at 551-52 & n.44.<sup>10</sup> The existence of those cases --

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<sup>10</sup> E.g., Edmond v. Secretary of Health, Education & Welfare, No. 89-3161 (6th Cir. April 19, 1989); Souch v. Califano, 599 F.2d 577, 578 n.1 (4th Cir. 1979);

each with a unique set of facts discussed only briefly if at all by the courts that decided them -- does not constitute one of the "special and important reasons" for granting a petition for writ of certiorari. S. Ct. R. 17.

B. The Principles Applied By The Third Circuit Are Not In Conflict With The Fifth Circuit's Perales Decision.

In appropriate circumstances, the Third Circuit itself has held remand orders to administrative agencies appealable. E.g., AJA Assocs. v. Army Corps of Eng'rs, 817 F.2d 1070, 1073 (3d Cir. 1987) (discussed by the court of appeals in this case at A 8-9); Horizons Int'l, Inc. v. Baldrige, 811 F.2d 154, 158 (3d Cir. 1987) (discussed by the

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Paluso v. Mathews, 573 F.2d 4, 8 (10th Cir. 1978); Lopez Lopez v. Secretary of Health, Education & Welfare, 512 F.2d 1155, 1156 (1st Cir. 1975); Gardner v. Moon, 360 F.2d 556, 558 n.2 (8th Cir. 1966); Jamieson v. Folsom, 311 F.2d 506, 507 (7th Cir.), app. dismissed & cert. denied, 374 U.S. 487 (1963).

court of appeals at A 8); United Steelworkers Local 1913 v. Union R.R., 648 F.2d 905, 909 (3d Cir. 1981) (discussed at A 7). The fact that the Third Circuit did not blindly follow the outcome of the 1969 Perales decision in this factually distinct case cannot be used to create a conflict where none exists. In words applicable to this case, Judge Adams explained in Bachowski v. Usery, 545 F.2d at 372-73:

This case does not present the same type of situation that the Fifth Circuit encountered in Perales. In that case, a failure to review the district court's guidelines, as to the admissibility of and the weight to be given to hearsay evidence, almost certainly would have foreclosed any possibility of review of that matter.

The court of appeals in this case held that the facts of Bachowski were controlling. (A 11 n.7). It should thus come as little surprise that, as the Secretary observes, "the Third Circuit did not even cite Perales and its progeny

in its decision in this case." (Pet. at 24 n.18).

C. Perales Is Clearly Distinguishable From This Case.

The Perales court recognized and clearly articulated the principles of the collateral order doctrine set out in Part I, supra, and considered by the court of appeals in this case. Indeed, the Perales court (412 F.2d at 48-49) quoted extensively from Cohen v. Beneficial Industrial Loan Corp., 337 U.S. at 546.

More important, the Perales court observed that "not all [remand] orders under 42 U.S.C. § 405(g) are appealable" and actually anticipated that the situation presented by this case -- "an order sua sponte by the court for the taking of additional evidence" -- is not immediately appealable. 412 F.2d at 48. But the Perales district court had remanded the case for a "full new

hearing" under a new evidentiary standard. Thus, the Perales court held, "[u]nless the Secretary is allowed to appeal from this order, he will never be able to reach the questions involved, because on the next appeal, if there is one, the sole question may be the substantiality of the evidence." Id. at 48. That, as the Perales court itself explained, is not this case. Id. Here, the district court has found the Secretary's decision that Mrs. Finkelstein's impairment does not equal a "Listed Impairment" to be supported by substantial evidence. (A 16). The effect of the district court's remand on any new decision by the Secretary -- based on her residual functional capacity -- will therefore be clear and distinct.

Numerous courts have also distinguished the facts presented in

Perales for precisely the reasons that the Bachowski court did.

Most telling, the Fifth Circuit itself, in a case not cited by the Secretary in his petition, has distinguished Perales. Tookes v. Harris, 699 F.2d at 529 (discussed at pp. 25-27, supra). The court in that case specifically rejected the Secretary's reliance on Perales because Perales involved "a collateral evidentiary ruling." Accord, e.g., Howell v. Schweiker, 699 F.2d at 526 ("[I]n both Perales and Gold, however, the court stressed that the district court had not only remanded the case, but also had made an evidentiary ruling adverse to the Secretary."); Farr v. Heckler, 729 F.2d at 1427 (distinguishing Perales as involving a "separate evidentiary ruling that would come within the Cohen doctrine"); Cranston Oil Service Co. v. Schlesinger, 595 F.2d 1203, 1205 (Temp.

Emer. Ct. App. 1979); see also Chastang v. Heckler, 729 F.2d 701, 702 (11th Cir. 1983) (distinguishing Perales to dismiss Secretary's appeal); Copeland v. Bowen, 861 F.2d at 539 (9th Cir. 1988) (distinguishing Stone v. Heckler, 772 F.2d at 465-68 (9th Cir. 1983) (relied on by the Secretary to demonstrate that the Ninth Circuit is in conflict with the Third (Pet. at 23)) as a collateral evidentiary order effectively unreviewable on subsequent appeal).

D. The Continued Vitality Of Perales Itself Is Questionable.

In another Fifth Circuit case not cited by the Secretary in his petition, Newpark Shipbuilding & Repair, Inc. v. Roundtree, 723 F.2d 399 (5th Cir.) (in banc), cert. denied, 469 U.S. 818 (1984), the court overruled its prior cases applying the collateral order doctrine to appeals from remands by the Benefits Review Board in appeals under 33 U.S.C.

§ 921(c). In banc, the Fifth Circuit held: "Our court now returns to the time tested doctrine that a remand order of the Board is interlocutory and unappealable as a matter of right, without exception." Newpark Shipbuilding & Repair, Inc. v. Roundtree, 723 F.2d at 407 n.8 (emphasis added). There is little reason to believe that the Fifth Circuit would not at least consider the ruling in Newpark in addressing future attempts to appeal remand orders by other administrative agencies.

III. THE SECRETARY WOULD HAVE THE COURT ENUNCIATE AN UNPRINCIPLED, IMPRACTICAL AND INEQUITABLE RULE THAT WOULD MAKE PIECEMEAL REVIEW OF ADMINISTRATIVE ADJUDICATIONS ROUTINE.

At bottom, the adjudicatory principle the Secretary seeks to apply is outcome-based: he would have the Court announce a rule allowing the Secretary to appeal when aggrieved by a district court

decision but prohibiting a claimant from doing so. (Compare Pet. at 23 with Pet. at 22 n.14). The Court should decline the Secretary's invitation to depart from all its decisions under Cohen and create such a rule, which would be unprincipled in theory, impractical in application, and inequitable in practice.

A. The Secretary's Rule Would Be Unprincipled.

Adopting the Secretary's rule would require a dramatic shift in focus from the nature of the order appealed from to the nature of the putative appellant. There is no difference based on neutral principles of finality between an appeal by the Secretary and one by a claimant. The Secretary therefore seeks an across-the-board rule allowing appeals by the Secretary (indeed any administrative agency) but never allowing appeals by the claimant. It was precisely this sort of bias that the

Court rejected when it disposed of the death-knell doctrine. Coopers & Lybrand v. Livesay, 437 U.S. at 476. Indeed, this Court's focus has always been on the type of order appealed from, not the party taking the appeal. E.g., Van Cauwenberghe v. Biard, 108 S. Ct. at 1947 (order denying motion to dismiss on ground of forum non-conveniens); Richardson-Merrell, Inc. v. Koller, 472 U.S. at 432 (order granting motion to disqualify counsel in a civil action); Firestone Tire & Rubber Co. v. Risjord, 449 U.S. at 377 (order denying motion to disqualify counsel); Coopers & Lybrand v. Livesay, 437 U.S. at 469 (order denying motion to certify class action). The Secretary's rule would be a dramatic and unwarranted departure from these precedents.

B. The Secretary's Rule Would Be Impractical.

The Secretary claims that institutional efficiency would be served by his proposed rule because "a rule of non-appealability also would impose an unwarranted burden" on the Social Security Administration, which would be required "to conduct additional proceedings that would prove to be unnecessary and wasteful of scarce resources." (Pet. at 18). That is astounding. The finality rule often requires litigants to endure long trials; in contrast, this administrative hearing will probably require no more than a few hours of an ALJ's time. Routine appealability would not ease any burden on the Social Security Administration. It would simply shift resources to where they do not belong -- from deciding claims to bringing appeals in the federal appellate courts. Indeed, in other cases

raising this issue, Secretary has argued successfully for holding the remand hearing before an appeal may be taken. See cases cited at p. 15 n. 3, supra. Moreover, the district court's decision in this case does not raise nationwide institutional concerns. The Secretary does not consider this district court opinion binding even in the Third Circuit. See pp. 35-36 & n.5, supra.

Finally, the Secretary ignores the important institutional concerns this Court has repeatedly articulated in support of the final judgment rule. See pp. 12-14, supra. Those institutional concerns outweigh the Secretary's desire to obtain immediate review for reasons explained by this Court in Richardson-Merrell, Inc. v. Koller:

"It would seem to us to be a disservice to the Court, to litigants in general and to the idea of speedy justice if we were to succumb to enticing suggestions to abandon the deeply-held distaste for piecemeal litigation

in every instance of temptation. Moreover, to find appealability in those close cases where the merits of the dispute may attract the deep interest of the court would lead, eventually, to a lack of principled adjudication or perhaps the ultimate devitalization of the finality rule as enacted by Congress." Bachowski v. Usery, 545 F.2d 363, 373-74 (CA3 1976).

Id., 472 U.S. at 440. Moreover, the Secretary's rule would make appellate review of district court remands to all administrative agencies routine, imposing a heavy burden on circuit judges, "who -- more than any other segment of the judiciary -- are struggling desperately to keep afloat in the flood of federal litigation." Board of Trustees of Keene State College v. Sweeney, 439 U.S. 25, 26 (1978) (Stevens, J., dissenting).

C. The Secretary's Rule Would Be Inequitable.

The burden of appellate review falls squarely on Social Security claimants. Indeed, claimants are already caused tremendous hardship by a program

"that couples substantive harshness with unparalleled procedural indulgence."

J. Mashaw, Social Security Hearings & Appeals at 134. According to the Government Accounting Office, disability claimants must wait, on average, over a year before an ALJ makes an initial decision on their claims. U.S. Gen. Accounting Office, Social Security: Selective Face-to-Face Interviews With Disability Claimants Could Reduce Appeals 13, Table 1.2 (GAO/HRD-89-22 April 1989). For those claimants who then proceed to district court -- their fourth level of review -- the average length of time between their initial application and the completion of proceedings following a district court remand is close to four years. Id. Because of the Secretary's appeal, Mrs. Finkelstein, who applied for benefits over six years ago, has not even reached this stage. The burden imposed by such delay during appellate review is

already unbearable, as one authority explains:

During this time period, many disabled persons are forced to subsist on state public assistance programs. Others are left with no means of subsistence. The benefits these claimants receive after years of administrative and judicial proceedings can hardly compensate for the loss of benefits when they were most needed. While waiting for the application of circuit law to their cases, claimants are deprived of basic necessities such as food and necessary medical care. They literally may not survive until the day when benefits are finally granted.

Diller & Morawetz, "Intracircuit Nonacquiescence and the Breakdown of the Rule of Law: A Response to Estreicher & Revesz," to be published in 99 Yale L.J. 801, 815-16 (January 1990) (footnotes omitted).

Remarkably, the Secretary asks this Court to inject yet a fifth level of routine appellate review into the Social Security process. It is respectfully

submitted that this Court should decline the Secretary's invitation.

#### CONCLUSION

The court of appeals properly applied well-settled principles of appellate jurisdiction to the remand order before it. Its decision was consistent with those of this Court and of other courts of appeals applying the same principles. The Secretary has not offered any special and important reason for this Court to consider transforming the limited exception carved out in Cohen into a license for wholesale disregard of the finality rule imposed by Congress.

The petition for writ of certiorari  
should be denied.

December 19, 1989

Respectfully submitted,

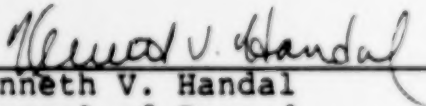
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# CERTIFICATE OF SERVICE

This is to certify that on the 18th day of December, 1989, three true and correct copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari were served by overnight mail on the Solicitor General, Department of Justice, 10th and Pennsylvania Avenues, N.W., Washington, D.C. 20530, and one true and correct copy was served by overnight mail on the Office of General Counsel to the Secretary of Health and Human Services, 200 Independence Avenue, S.W., Room 722A, Washington D.C. 20201.

  
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Supreme Court, U.S.

FILED

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**In the Supreme Court of the United States**

OCTOBER TERM, 1989

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LOUIS W. SULLIVAN, SECRETARY  
OF HEALTH AND HUMAN SERVICES, PETITIONER

v.

MARILYN FINKELSTEIN

---

ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

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REPLY BRIEF FOR THE PETITIONER

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## In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-504

LOUIS W. SULLIVAN, SECRETARY  
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v.

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ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

REPLY BRIEF FOR THE PETITIONER

Respondent's defense of the court of appeals' jurisdictional ruling (see Br. in Opp. 12-38) entirely ignores one of the two alternative theories under which the district court's order is appealable pursuant to 28 U.S.C. 1291 and fails to recognize the distinct nature of judicial review of agency action that underlies the other theory. Respondent's further contention (Br. in Opp. 42-56) that the jurisdictional issue does not in any event warrant review is fatally undermined by her concession that the decision below conflicts with the decisions of five other courts of appeals.

1. a. The district court order in this case is appealable under either of two alternative theories. First, the order is a "final decision" for purposes of 28 U.S.C. 1291 because it constitutes a final rejection of the particular decision of the Secretary before the

district court and therefore terminated the relevant judicial proceedings. The administrative decision before the court denied respondent's application for benefits on the ground that her impairment did not meet or equal the Listing of Impairments, as required by the regulations governing claims for widow's disability benefits. The district court sustained, as supported by substantial evidence, the Secretary's finding that respondent does not have such an impairment. Pet. App. 16a. But instead of affirming the Secretary's decision, the court remanded the cause to the Secretary to inquire into whether respondent is in fact unable to perform any gainful activity. *Id.* at 17a-18a, 25a. Respondent does not dispute that the court's order effectively invalidated the regulation requiring a claimant for widow's benefits to show that she has an impairment that meets or equals the Listing and directed the Secretary to render a new decision under a different legal standard. A district court order having that effect is a "final decision" for purposes of 28 U.S.C. 1291.

The text of 42 U.S.C. 405(g) confirms this conclusion. The fourth sentence of Section 405(g) provides that the district court "shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Secretary, with or without remanding the cause for a rehearing." This language aptly describes what the district court did here: the court "affirm[ed]" the Secretary's decision insofar as he found that respondent does not have an impairment that meets or equals the Listing; it "modif[ied]" or "revers[ed]" the Secretary's decision insofar as it denied respondent's claim on that basis; and it "remand[ed] the cause for a rehearing," at which the Secretary must apply a different legal standard than the one set forth in the governing regulations. Congress's use of the term "judgment" indicates in itself that such an order is appealable, because the word "judgment" is a term of art that "includes a decree and any order from which an appeal lies." Fed. R. Civ. P. 54(a). But however that may be, the eighth sentence of 42 U.S.C. 405(g) provides that "[t]he judgment of the court shall be final except that it shall be subject to review in the same manner as a judgment in other civil actions."

Respondent ignores the fourth and eighth sentences of 42 U.S.C. 405(g), which speak directly to the appealability issue,

and focuses instead (Br. in Opp. 22-27, 29-31, 52-55) on the sixth sentence. In her view, the sixth sentence suggests that essentially all orders that include a remand to the Secretary are interlocutory and nonappealable because that sentence provides for the Secretary to file amended findings and decision with the court after a remand. Respondent misapprehends the statutory scheme.

The sixth sentence of Section 405(g) authorizes the court to order a remand to the Secretary in certain circumstances other than those addressed by the fourth sentence—*i.e.*, other than those in which the court remands the cause as part of its ruling on the merits. The sixth sentence provides:

The court may, on motion of the Secretary made for good cause shown before he files his answer, remand the case to the Secretary for further action by the Secretary, and it may at any time order additional evidence to be taken before the Secretary, but only upon a showing that there is new evidence which is material and that there is good cause for the failure to incorporate such evidence into the record in a prior proceeding; and the Secretary shall, after the case is remanded, and after hearing such additional evidence if so ordered, modify or affirm his findings of fact or his decision, or both, and shall file with the court any such additional and modified findings of fact and decision, and a transcript of the additional record and testimony upon which his action in modifying or affirming was based.

The sixth sentence requires the Secretary to file with the court any additional or modified findings of fact or decision he makes on remand because that sentence furnishes a mechanism for conducting further administrative proceedings *before* the court passes on the validity of the Secretary's decision. Thus, it is only after the Secretary reconsiders his own decision in light of the "new evidence" (or in light of other circumstances that prompted a pre-answer remand) that the court can properly pass on the validity of that decision and affirm, modify or reverse it.<sup>1</sup> An order

<sup>1</sup> Respondent's quotation and discussion of the sixth sentence of Section 405(g) (Br. in Opp. 21-24, 28-30) omit any reference to the critical requirement that there be "new evidence" to justify a remand other than one requested by the Secretary prior to filing his answer. It is consistent with the Secretary's

remanding the case for this limited purpose is not appealable under 28 U.S.C. 1291, because it does not constitute a final ruling by the court that the Secretary's decision is erroneous. *Cohen v. Perales*, 412 F.2d 44, 48-49 (5th Cir. 1969), rev'd on other grounds, 402 U.S. 389 (1971).

Contrary to respondent's contention, the order in the instant case was not governed by the limited remand authority in the sixth sentence of Section 405(g), because: (i) it was not entered on the motion of the Secretary (either before or after he filed his answer), and (ii) it was not made on the basis of a showing or finding that there was "new evidence" material to the Secretary's decision. Instead, the district court remanded the case to the Secretary only as a consequence of its holding that his decision denying respondent's claim was legally erroneous because it was based solely on the finding that her impairment did not meet or equal the Listing. As we have explained, a remand made only as an incident to the court's ruling on the merits is governed by, and is appealable under, the fourth and eighth sentences of Section 405(g).

Respondent argues (Br. in Opp. 22-23, 29-32, 39-40) that our submission in this regard is inconsistent with *Sullivan v. Hudson*, 109 S. Ct. 2248 (1989). That case, however, involved the availability of attorney's fees under the Equal Access to Justice Act, 28 U.S.C. 2412(d)(1)(B), following a remand to the Secretary. The Court did not discuss the appealability of a remand order of the sort at issue here or the specific language in the fourth and eighth sentences of Section 405(g) that refers to such an order as a "judgment" that is "final" and "subject to review in the same manner as a judgment in other civil actions."

b. In the alternative, the order at issue here is appealable under principles analogous to those underlying the "collateral order" doctrine that the Court has applied to certain orders entered in

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primary jurisdiction to require the Secretary to receive and weigh *all* evidence bearing on the claim. And it would be inconsistent with the requirement under 42 U.S.C. Section 405(g) that the district court's judgment be entered "upon the pleadings and transcript of [the administrative] record," for the court to receive and weigh newly discovered evidence in the first instance.

the course of on-going proceedings in a district court. See Pet. 15-16, 21. Respondent does not dispute that the district court decided an important legal issue concerning the validity of the regulations governing applications for widow's disability benefits. She argues, however, that the order is not appealable because that issue is not "completely separate" from the merits of her claim for benefits. Br. in Opp. 18-19, 20-21, quoting *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978). Respondent disregards the significant legal and practical distinctions, for appealability purposes, between an order remanding a matter to an agency for a new round of administrative proceedings and an order entered in on-going proceedings in the district court itself. As this Court has observed (*FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 141 (1940)):

A review by a federal court of the action of a lower court is only one phase of a single unified process. \* \* \* The technical rules derived from the interrelationship of judicial tribunals forming a hierarchical system are taken out of their environment when mechanically applied to determine the extent to which Congressional power, exercised through a delegated agency, can be controlled within the limits of the "judicial power" conferred by Congress under the Constitution.

The district court's order in this case was not merely one step toward an adjudication of the merits of respondent's claim for benefits by the court itself. To the contrary, the order removed the claim from the immediate cognizance of the court and returned it to the jurisdiction of the officer of a coordinate Branch in whom Congress has vested the power to adjudicate claims for Social Security benefits, subject only to limited review by the courts. Moreover, the legal issue resolved by the district court cannot be reconsidered by the Secretary in the rehearing on remand, which will address the distinct question whether respondent is in fact unable to perform any gainful activity. The district court's order therefore finally determined the legal issue of the validity of the Secretary's regulation, and that issue is sufficiently distinct from the factual issues that would be resolved on remand

to render the order a "final decision" within the meaning of 28 U.S.C. 1291. Compare *Mitchell v. Forsyth*, 472 U.S. 511, 527-528 (1985). That is especially so since entertaining the Secretary's appeal would not interrupt on-going proceedings before either the court or the Secretary, while refusing to entertain the appeal would require new and unwarranted proceedings before the Secretary.

Respondent's related assertion (Br. in Opp. 28-36) that the Secretary should not be permitted to take an appeal now because appellate consideration of the validity of the widow's disability regulations might not be entirely foreclosed following the remand likewise ignores the distinct nature of judicial review of administrative action. As an initial matter, nothing in Section 405(g) expressly provides for the Secretary to obtain judicial review (including appellate review) of his own decision if he determines on remand that he must award benefits under the legal standards imposed by the district court. See Pet. 17 n.10. But even if respondent is correct (Br. in Opp. 28-33) that the Secretary nevertheless may obtain court of appeals review by filing his new decision on remand with the district court, requesting the court to enter a judgment affirming that decision, and then appealing the judgment that affirms his own decision, certainly nothing in Section 405(g) requires the Secretary to pursue that awkward course, and thereby to accept the burden of a remand before obtaining appellate review on a dispositive legal issue that underlies his own carefully considered decision denying a claim for benefits. To the contrary, the fourth and eighth sentences of Section 405(g) expressly contemplate that the Secretary may take an immediate appeal from a district court order holding the Secretary's decision denying a claim for benefits legally erroneous, even though the court has remanded the cause to the Secretary for a rehearing and even though the same claim for benefits therefore might be brought back before the district court following the remand. Respondent's proposal to postpone all appellate review until the Secretary has rendered a new decision on remand thus both fails to accord the respect due the official of a coordinate Branch who is charged with administering the Act and conflicts with the text of Section 405(g).

2. Respondent's contention (Br. in Opp. 42-56) that the jurisdictional issue does not in any event warrant review is without merit. We have shown (Pet. 19-25) that the decision below conflicts with the Fifth Circuit's seminal holding in *Cohen v. Perales*, *supra*, and with similar holdings by a number of other courts of appeals.

a. In *Perales*, the district court remanded the case to the Secretary for a rehearing under different evidentiary principles. The Fifth Circuit held that it had jurisdiction over the Secretary's appeal on both of the theories discussed above—*i.e.*, that the fourth and eighth sentences of Section 405(g) rendered the remand order an appealable final judgment, and that the order was appealable under principles of practical finality derived from the collateral order doctrine of *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). 412 F.2d at 48-49. As we have explained (Pet. 22-23), and as respondent does not dispute, the jurisdictional ruling in *Perales* has special significance because it was not disturbed by this Court when it reversed the Fifth Circuit on the evidentiary issue, even though the Court's own jurisdiction under 28 U.S.C. 1254(1) depended on whether the case was properly "in" the court of appeals.

Respondent questions (Br. in Opp. 55-56) the continuing precedential force of *Perales* as a result of the Fifth Circuit's en banc decision in *Newpark Shipbuilding & Repair, Inc. v. Roundtree*, 723 F.2d 399, cert. denied, 469 U.S. 818 (1984). That case, however, involved the distinct question whether the court of appeals had jurisdiction under 33 U.S.C. 921(c) over an order of the Benefits Review Board that remanded a claim to an administrative law judge for further proceedings. In holding that it did not have jurisdiction, the en banc Fifth Circuit did not even cite, much less overrule, *Perales*. Respondent also attempts (Br. in Opp. 52-55) to distinguish *Perales* on the ground that this case involves only a remand for the taking of additional evidence, whereas in *Perales* the Fifth Circuit also made an evidentiary ruling adverse to the Secretary. But as we have explained above, the district court in this case did not simply remand to allow the Secretary to consider newly discovered evidence, while reserving judgment on the validity of the decision of the Secretary

that was before the court on judicial review. Instead, like the Fifth Circuit in *Perales*, it found the Secretary's decision legally erroneous, resolved a distinct legal issue in the process, and remanded to the Secretary for further proceedings under different legal standards. Respondent's attempt to distinguish *Perales* therefore is without merit.

b. We also have shown (Pet. 23-24) that the decision below squarely conflicts with holdings by the First, Sixth, Seventh, Ninth and Tenth Circuits that the Secretary may appeal a district court order holding the Secretary's decision legally erroneous and remanding for further proceedings under different legal standards or evidentiary principles. See *Colon v. Secretary of HHS*, 877 F.2d 148, 149-151 (1st Cir. 1989); *Lopez Lopez v. Secretary of HEW*, 512 F.2d 1155, 1156 (1st Cir. 1975); *Edmond v. Secretary of HHS*, No. 89-3161 (6th Cir. Apr. 19, 1989); *Daviess County Hospital v. Bowen*, 811 F.2d 338, 341-342 (7th Cir. 1987); *Edgewater Hospital, Inc. v. Bowen*, 857 F.2d 1123 (7th Cir. 1988); *Jamieson v. Folsom*, 311 F.2d 506, 507 (7th Cir.), cert. denied, 374 U.S. 487 (1963); *Stone v. Heckler*, 722 F.2d 464, 466-468 (9th Cir. 1983); *Ensey v. Richardson*, 469 F.2d 664 (9th Cir. 1972); *Paluso v. Mathews*, 573 F.2d 4, 7-8 (10th Cir. 1978) (Black Lung case).<sup>2</sup> Indeed, the Secretary's appeal in *Edmond* presents the same issue on the merits as his appeal in the instant case (the validity of the widow's disability regulations), and the Sixth Circuit, in contrast to the court below, held that it has jurisdiction over the Secretary's appeal from the district court's order remanding the cause to the Secretary to determine whether the claimant can engage in any gainful activity. See also *Davidson v. Secretary of HHS*, No. 88-1472 (10th Cir. Oct. 12, 1989) (making a "preliminary determination" in favor of jurisdiction over Secretary's appeal in similar widow's case).

<sup>2</sup> The Fourth, Eighth, and Eleventh Circuits also have held such orders appealable (*Souch v. Califano*, 599 F.2d 577, 578 n.1 (4th Cir. 1979); *Gardner v. Moon*, 360 F.2d 536, 538 n.2 (8th Cir. 1966); *Pickett v. Bowen*, 833 F.2d 288, 290-291 (11th Cir. 1987)), although, without mentioning those rulings, the Fourth and Eleventh Circuits have recently held (and the Eighth Circuit has recently stated in dictum) that such an order is *not* appealable. See Pet. 24 & n.19.

Respondent points out (Br. in Opp. 47-49) that several of the cases upon which we rely involved challenges to the jurisdiction of the district court or a requirement that the Secretary redetermine the claim under different evidentiary standards. But respondent does not explain why this distinguishes the cases for purposes of appellate jurisdiction, since her contention that a legal issue resolved by the district court in remanding the cause should be raised in an appeal following the remand would apply equally to those issues. Moreover, even if we assume, *arguendo*, that the distinctions respondent identifies in these cases are material, she does not even attempt to distinguish the *other* cases upon which we rely. She merely refers to them as a "small number" of decisions that have allowed appeals without extended discussion. Br. in Opp. 49-50 & n.10. This effort to minimize the clear circuit conflict is unavailing, because the contrary decisions she attempts to dismiss in this manner were rendered by no less than five other circuits. Moreover, two of those five decisions were rendered prior to and were cited in support of the jurisdictional ruling in *Perales* itself (see 412 F.2d at 48, citing *Jamieson* and *Gardner*); two others expressly relied upon *Perales*, which did extensively discuss the appealability issue (see *Lopez Lopez*, 512 F.2d at 1156; *Paluso*, 573 F.2d at 8); and the fifth (and most recent) was rendered only after the Sixth Circuit specifically requested the Secretary to brief the jurisdictional issue (*Edmond*). Finally, although the question of the appealability of remand orders has generated the most litigation and conflicting rulings in Social Security cases, the right of the agency concerned to appeal a remand order has been sustained in other contexts as well. See *Occidental Petroleum Corp. v. SEC*, 873 F.2d 325, 329-330 (D.C. Cir. 1989); Pet. 23-25. This important and recurring jurisdictional issue therefore warrants resolution by this Court.

For the foregoing reasons and the additional reasons stated in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

KENNETH W. STARR  
Solicitor General

JANUARY 1990

(5)  
No. 89-504

Supreme Court, U.S.

FILED

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CLERK

**In the Supreme Court of the United States**

OCTOBER TERM, 1989

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LOUIS W. SULLIVAN, SECRETARY  
OF HEALTH AND HUMAN SERVICES, PETITIONER

v.

MARILYN FINKELSTEIN

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ON WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

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**BRIEF FOR THE PETITIONER**

---

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### QUESTION PRESENTED

Whether, in an action under 42 U.S.C. 405(g) for judicial review of the final decision of the Secretary of Health and Human Services denying a claim for Social Security disability benefits, the Secretary may appeal an order of the district court that rejects the legal basis for the Secretary's decision and, as a consequence, remands the cause to the Secretary for a rehearing under a different legal standard.

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**In the Supreme Court of the United States**

OCTOBER TERM, 1989

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No. 89-504

LOUIS W. SULLIVAN, SECRETARY  
OF HEALTH AND HUMAN SERVICES, PETITIONER

*v.*

MARILYN FINKELSTEIN

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*ON WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT*

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**BRIEF FOR THE PETITIONER**

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**OPINIONS BELOW**

The opinion of the court of appeals, as amended by order dated May 19, 1989 (Pet. App. 1a-12a), is reported at 869 F.2d 215, and the opinion of Judge Becker dissenting from the denial of rehearing en banc (Pet. App. 23a-24a) is reported at 869 F.2d 220. The opinion of the district court (Pet. App. 13a-18a) is unreported.

**JURISDICTION**

The judgment of the court of appeals was entered on March 3, 1989 (Pet. App. 19a-20a), and a petition for rehearing was denied on May 24, 1989 (Pet. App. 21a-22a). By order dated August 9, 1989 Justice Brennan extended the time within which to file a petition for a writ of certiorari to and including September 21, 1989. The petition was filed on that date and was granted on January 22, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### STATUTORY PROVISIONS INVOLVED

28 U.S.C. 1291 and Section 205(g) of the Social Security Act, as codified at 42 U.S.C. 405(g), are set forth in an Appendix to this brief. App., *infra*, 1a-2a.

### STATEMENT

1. Respondent is the widow of a wage earner who died on August 27, 1980, while fully insured under Title II of the Social Security Act, 42 U.S.C. 401 *et seq.* On November 25, 1983, respondent applied for widow's disability benefits under Title II.

The statutory standard of disability for the widow, widower, or surviving divorced spouse of a wage earner<sup>1</sup> is different from and more stringent than that for the wage earner. In the case of a wage earner, the Social Security Act provides that the term "disability" means the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months." 42 U.S.C. 423(d)(1)(A). The Act further provides that a wage earner shall be determined to be under a disability only if his impairment is "of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy" (42 U.S.C. 423(d)(2)(A)). By contrast, under 42 U.S.C. 423(d)(2)(B), which was enacted in 1968,<sup>2</sup> a surviving spouse shall not be determined to be disabled unless his or her impairment is "of a level of severity which under regulations prescribed by the Secretary is deemed to be sufficient to preclude an individual from engaging in any gainful activity." See

<sup>1</sup> For convenience, we shall hereafter refer to this class of persons as "surviving spouses."

<sup>2</sup> Social Security Amendments of 1967, Pub. L. No. 90-248, § 158(b), 81 Stat. 868.

*Sullivan v. Zebley*, No. 88-1377 (Feb. 20, 1990), slip op. 14-15.

The regulations implementing the latter statutory section, which were promulgated soon after passage of 42 U.S.C. 423(d)(2)(B) in 1968,<sup>3</sup> provide that a surviving spouse's impairment is deemed to be of sufficient severity to preclude gainful activity only if it meets or equals the severity of an impairment included in the Listing of Impairments in App. 1 to 20 C.F.R. Pt. 404, Subpt. P. See 20 C.F.R. 404.1525(a), 404.1577, 404.1578(a). Thus, under the regulations prescribed by the Secretary, a surviving spouse's impairment is evaluated solely on the basis of the medical severity of that impairment. The Secretary does not consider any further limitations on the surviving spouse's ability to work that may result from the adverse effects of age, education, or work experience, as he would in the case of a wage earner. 20 C.F.R. 404.1577, 404.1578(a); see *Sullivan v. Zebley*, slip op. 15; *Bowen v. Yuckert*, 482 U.S. 137, 149 n.7 (1987); *id.* at 163-164 & n.3 (Blackmun, J., dissenting).<sup>4</sup>

2. Respondent's application for surviving spouse's disability benefits under 42 U.S.C. 423(d)(2)(B) was denied at all four levels of the administrative process on the ground that her coronary condition did not meet or equal an impairment contained in the Listing. Pet. App. 16a.<sup>5</sup> After respondent exhausted her administrative

<sup>3</sup> 33 Fed. Reg. 11,749, 11,751, 11,755 (1968), adding 20 C.F.R. 404.1504, 404.1506(a)(1).

<sup>4</sup> The Senate Report on the 1968 amendments that added 42 U.S.C. 423(d)(2)(B) stated that "[t]he determination of disability in the case of a widow or widower would be based solely on the level of severity of the impairment"; that such a determination "would be made without regard to nonmedical factors such as age, education, and work experience, which are considered in disabled worker cases"; and that "individuals whose impairments do not meet this level of severity may not in any case be found disabled." S. Rep. No. 744, 90th Cong., 1st Sess. 49-50 (1967).

<sup>5</sup> The initial determination of disability is made by a state agency acting under the authority and supervision of the Secretary. 42

remedies through the Appeals Council, she sought judicial review of the Secretary's final decision, pursuant to 42 U.S.C. 405(g), in the United States District Court for the District of New Jersey.

The district court upheld, as supported by substantial evidence, the Secretary's decision that respondent's coronary impairment did not meet or equal an impairment contained in the Listing. Pet. App. 15a-16a. It further held, however, that the Secretary may not deny a surviving spouse's claim for disability benefits on that basis alone, but instead must make an individualized determination of the functional impact of the impairment on the claimant in order to determine whether she in fact retains sufficient residual functional capacity to perform any gainful activity. *Id.* at 17a-18a. The effect of this ruling was to invalidate the Secretary's longstanding regulations to the extent that they require an applicant for surviving spouse's disability benefits to show an impairment that meets or equals a listed impairment.<sup>6</sup> The

U.S.C. 421(a); 20 C.F.R. 404.1503. If the claimant is dissatisfied with the initial determination, he may request a de novo reconsideration by the state agency. 20 C.F.R. 404.909(a). If the claim is denied on reconsideration, the claimant may then request a de novo hearing before an administrative law judge (ALJ) in the Office of Hearings and Appeals of the Social Security Administration. 42 U.S.C. 405(b)(1) (1982 & Supp. IV 1986); 20 C.F.R. 404.929. Finally, the claimant may seek review by the Appeals Council. 20 C.F.R. 404.967. See *Bowen v. Yuckert*, 482 U.S. at 142; *Bowen v. City of New York*, 476 U.S. 467, 472 (1986). If the Appeals Council denies review, or grants review and affirms the denial of benefits, the claimant may then seek judicial review of that "final decision" pursuant to 42 U.S.C. 405(g). 20 C.F.R. 404.981. The Act contains no provision for the Secretary to seek judicial review of a decision by his own Appeals Council in favor of the claimant.

<sup>6</sup> A claimant's "residual functional capacity" is "what [the claimant] can still do *despite* [his] impairments" (20 C.F.R. 404.1545) (emphasis added). Under governing regulations, the Secretary measures this capacity only for the purpose of determining, at steps four and five of the sequential evaluation process utilized for wage earners, whether a claimant whose impairment does not meet or

court therefore "directed" the Secretary "to inquire whether [respondent] may or may not engage in any gainful activity, as contemplated by the Act" (*id.* at 18a), and ordered "that the matter be remanded to the Secretary for further proceedings in accordance with [the] Court's opinion." *Id.* at 25a.

3. The Secretary appealed the district court's order. He defended the validity of the regulations requiring an applicant for surviving spouse's disability benefits to show an impairment that meets or equals the Listing, and argued that the district court therefore should have affirmed the Secretary's final decision because the court correctly upheld, as supported by substantial evidence, the Secretary's finding that respondent did not have such an impairment. Pet. App. 2a-4a.<sup>7</sup> On March 3, 1989, the

equal a listed impairment nevertheless is disabled because he cannot perform his past work or other work in the national economy, in light of his age, education, and work experience. 20 C.F.R. 404.1520(e) and (f), 404.1545(a), 404.1561; *Bowen v. City of New York*, 476 U.S. at 471. Because the eligibility of a surviving spouse is based on the severity of the impairment itself, and not on what the claimant can do despite that impairment, the regulations do not provide for an assessment of a surviving spouse's residual functional capacity.

<sup>7</sup> In *Sullivan v. Zebley*, this Court considered the Secretary's regulations requiring a claimant for children's disability benefits (under Title XVI of the Social Security Act, 42 U.S.C. 1381 *et seq.* (1982 & Supp. IV 1986)) to show an impairment that meets or equals an impairment in the Listing. The Court held that the regulations were inconsistent with the relevant statutory provision governing children's benefits, 42 U.S.C. 1383c(a)(3)(A) (1982 & Supp. IV 1986). Slip op. 19. However, in so ruling, the Court expressly distinguished the statutory provision governing surviving spouse's benefits under Title II. See slip op. 14-15. *Zebley* thus in no way moots the underlying legal issue that formed the basis of the Secretary's appeal in this case. Indeed, the decision in *Zebley* reinforces our position on the merits in this case—that the district court erred in holding invalid the Listing-only rule for surviving spouses.

court of appeals dismissed the Secretary's appeal for lack of jurisdiction, holding that the district court's order was an interlocutory order, not a "final decision," for purposes of 28 U.S.C. 1291. Pet. App. 1a-12a, 19a-20.

The court of appeals first noted its previous articulation of a general rule that "remands to administrative agencies are not ordinarily appealable under section 1291," because "[s]uch a remand is typically an interlocutory step in the adjudicative process and, therefore, not a final order." Pet. App. 4a (quoting *United Steelworkers, Local 1913 v. Union R.R.* 648 F.2d 905, 909 (3d Cir. 1981)). The court acknowledged that its prior decisions established an exception to that general rule for "cases in which an important legal issue is finally resolved and review of that issue would be foreclosed 'as a practical matter' if an immediate appeal were unavailable." Pet. App. 4a-5a. But after reviewing those decisions (*id.* at 7a-9a), the court found that exception inapplicable here, because, in the court's view, "it is not inexorably so" that the legal ruling on which the district court's order was based would escape appellate review. *Id.* at 9a (quoting *Bachowski v. Usery*, 545 F.2d 363, 373 (3d Cir. 1976)). See generally Pet. App. 9a-12a. The court reasoned that the question whether the district court had made an error of law would be subject to review by the court of appeals if events subsequent to the district court's order at issue here unfolded in a particular way, namely: (a) if the Secretary, after considering respondent's residual functional capacity on remand, made an individualized determination that respondent is not precluded from engaging in any gainful activity; (b) if respondent sought judicial review of that decision of the Secretary; (c) if the district court reversed the Secretary's new decision and ordered an award of benefits; and (d) if the Secretary appealed that subsequent order of the district court to the court of appeals. *Id.* at 9a-11a; see also *id.* at 7a.

The court candidly proceeded on the assumption that the Secretary would be denied any opportunity for appellate review of the district court's legal ruling if events did not unfold in the manner just described—specifically if, on remand, the ALJ or Appeals Council was required to find respondent disabled and award her benefits under the district court's view of the controlling standards. Pet. App. 9a-10a, 11a. But the court concluded that this possible preclusion of any opportunity for the Secretary to obtain appellate review of the central legal issue in the case was "of no more significance" than it was in another Third Circuit case (*Brotherhood of Maintenance of Way Employees v. Consolidated Rail Corp.*, 864 F.2d 283 (1988)) in which it had dismissed an appeal even though the appellant might be deprived of any opportunity to challenge the legal ruling that led to the remand. Pet. App. 11a.

The court of appeals also acknowledged that, in a number of prior cases, it had found appellate jurisdiction over similar district court orders on the theory that the order constituted a final rejection of the agency's position that under the governing law, no further administrative hearing or other proceedings were required. Pet. App. 7a-9a, 12a. But the court found that rationale inapposite in this case because, in its view, the legal issue presented here is not whether the governing statute or regulations require a hearing, but whether an additional factor (respondent's residual functional capacity) must be considered by the Secretary before he makes a final administrative adjudication of the benefits claim. *Id.* at 12a. Finally, although the appeal in this case was taken not by respondent but by the Secretary, who was seeking reinstatement of his final decision, the court of appeals found it significant that respondent "ha[d] no vested right in anything" and that the district court's order therefore "did not take away something which she had already been given," but rather "postponed final disposi-

tion in her case until the Secretary had considered an additional factor." *Ibid.*<sup>8</sup>

4. The Secretary's petition for rehearing en banc was denied, with three judges dissenting. Pet. App. 21a-22a. Judge Becker, who was a member of the panel, explained his vote for rehearing en banc in a statement joined by Judges Sloviter and Stapleton. *Id.* at 23a-24a. Judge Becker stated that he had joined the panel's opinion because he felt bound to do so by the Third Circuit's decision in *Bachowski v. Usery*, 545 F.2d 363 (1976), even though *Bachowski* "seems inconsistent at least with the spirit of [the Third Circuit's] later jurisprudence." Pet. App. 23a. But Judge Becker explained that if free to do so, he would follow the reasoning of the recent decision in *Occidental Petroleum Corp. v. SEC*, 873 F.2d 325, 328-332 (D.C. Cir. 1989), and hold that the court of appeals had appellate jurisdiction in this case. Judge Becker elaborated (Pet. App. 23a):

In [*Occidental Petroleum*], Judge [Douglas] Ginsburg, speaking for the court, expressed the view that Congress did not intend that the final order rule place an agency in a position of dependence upon the self-interest of others in order to get review of a legal decision that dictates the standards and procedures to be applied by the agency in making its decisions. Here, as in *Occidental*, the Secretary is between the proverbial rock and a hard place. If the Secretary, bound by the district court's opinion, grants benefits on remand to [respondent], he cannot appeal. If the Secretary does not grant benefits on remand, whether or not the legal issue will be

<sup>8</sup> In light of its jurisdictional holding, the court of appeals did not express an opinion on the district court's ruling that "a widow whose impairment does not meet or equal any in the listing is entitled to have her residual functional capacity considered." Pet. App. 3a-4a n.4. But the court did note its prior holding that "a stricter standard does apply in widow's disability cases." *Id.* at 4a n.4 (citing *Smith v. Schweiker*, 671 F.2d 789, 790 (3d Cir. 1982)).

reviewed depends on whether [respondent] decides to press an appeal.<sup>9</sup>

## SUMMARY OF ARGUMENT

The court of appeals had jurisdiction of the Secretary's appeal under 28 U.S.C. 1291. The district court's order in this case was a "final decision" for purposes of that provision because it constituted a final rejection of the particular decision of the Secretary that was before the district court on judicial review.

1. The jurisdiction of the court of appeals is established by the text and structure of 42 U.S.C. 405(g). That provision makes it clear that the district court's decision here—which rejected on the merits the legal standard underlying the Secretary's decision—is a "judgment" that is "final" and subject to appellate review even though, as an aspect of its relief, the court remanded the cause to the Secretary for rehearing under a different legal standard. That conclusion is reinforced by Congress's identification in Section 405(g) of certain other remands that are interlocutory in nature and that do not constitute final judgments. This Court's decision in *Sullivan v. Hudson*, 109 S. Ct. 2248 (1989), relied on by respondent, is not to the contrary, since it dealt only with the very different question of an award of attorney's fees, under the Equal Access to Justice Act (EAJA), 28 U.S.C. 2412, for legal services rendered to a claimant on remand.

2. The conclusion that 42 U.S.C. 405(g) renders the district court's order appealable is strongly supported by established principles governing judicial review of agency action and the appealability of district court orders under 28 U.S.C. 1291. Indeed, this Court has previously granted review on the merits of court of appeals

<sup>9</sup> On September 7, 1989, the district court, with respondent's consent, stayed its order of remand pending this Court's disposition of the instant petition for a writ of certiorari.

decisions in situations indistinguishable from that presented here. And it has itself reviewed decisions under the Hobbs Act, 28 U.S.C. 2341 *et seq.*, which authorizes such review of "final" judgments of the courts of appeals, 28 U.S.C. 2350, in instances in which the court of appeals' judgment has included a remand to the agency for further proceedings.

This Court has recognized in a variety of instances that Section 1291 is addressed to the maintenance of a healthy legal system, that it must be given a practical and not a technical construction, and that it is therefore not limited to orders that terminate the proceedings in all respects. Instances in which appeals have been allowed include cases involving "collateral orders," *e.g.*, *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), and cases in which, as a practical matter, there would be no further litigation of the issue in the federal system, *e.g.*, *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 7 (1983).

This case differs from prior cases in which the Court has considered the appealability question because the order at issue here was not entered in the course of ordinary civil or criminal litigation. It was entered, instead, in the context of judicial review of final agency action. In that context, when a district court holds an agency's decision unlawful, a coordinate Branch of government is immediately aggrieved. Moreover, the nature of judicial review of agency action is such that the district court's judgment effectively ends the judicial proceeding on the merits; in this case, the matter before the district court was the agency decision under review, not respondent's underlying claim for benefits. The division of functions between agency and reviewing court leaves the resolution of that claim to the agency.

Even if the proceedings before the district court and those before the Secretary are viewed as aspects of a broader controversy over respondent's claim to benefits,

the principles informing the "collateral order" doctrine support appellate review here. The Secretary's appeal of the district court order does not interfere with any on-going proceedings in the district court or undermine the independence of the district judge. On the contrary, allowance of an appeal is necessary to vindicate the special role and distinct responsibilities of the Secretary, who is the Executive Branch officer responsible for administering the Social Security Act.

Indeed, the Secretary's right to appeal is consistent with the three factors the Court has identified in applying the collateral order doctrine. See *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978). First, the district court has conclusively determined a disputed question of law. Second, the district court order is "completely separate" from the merits in the relevant sense because there will be *no* further development of legal or factual issues by the district court at a trial—the further proceeding contemplated will, instead, take place in another Branch under a different legal standard—and because the issue resolved by the district court cannot be reconsidered by the Secretary on remand. Finally, the district court's ruling is not effectively reviewable on appeal from a later judgment because, if respondent prevails on remand or does not pursue her claim, the Secretary will be unable to appeal from that decision.

## ARGUMENT

### THE COURT OF APPEALS HAD JURISDICTION OF THE SECRETARY'S APPEAL

Section 1291 of Title 28 provides that "[t]he courts of appeals \* \* \* shall have jurisdiction of appeals from all final decisions of the district courts \* \* \* except where a direct review may be had in the Supreme Court." This provision is a descendant of Section 22 of the Judiciary Act of 1789, ch. 20, 1 Stat. 84, which provided that "final decrees and judgments" in civil actions in a district court could be reexamined and affirmed or reversed by the circuit court. For these purposes, a final judgment is normally deemed not to have been entered "until there has been a decision by the District Court that 'ends the litigation on the merits and leaves nothing for the court to do but execute its judgment.'" *Midland Asphalt Corp. v. United States*, 109 S. Ct. 1494, 1497 (1989) (quoting *Van Cauwenberghe v. Biard*, 108 S. Ct. 1945, 1949 (1988), and *Catlin v. United States*, 324 U.S. 229, 233 (1945)).

The Court has recognized, however, that under Section 1291, "it is a final decision that Congress has made reviewable," not a final judgment. *Stack v. Boyle*, 342 U.S. 1, 12 (1951) (opinion of Jackson, J.). As a result, "a decision 'final' within the meaning of § 1291 does not necessarily mean the last order possible to be made in a case." *Mitchell v. Forsyth*, 472 U.S. 511, 524 (1985) (quoting *Gillespie v. United States Steel Corp.*, 379 U.S. 148, 152 (1964)). And in determining whether a particular type of order is immediately appealable under Section 1291, the requirement of finality must be given a "practical rather than a technical construction." *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949).

The district court's order in this case is a "final decision" for purposes of 28 U.S.C. 1291 because it constituted a final rejection of the particular decision of the

Secretary that was before the district court on judicial review; the district court's decision therefore terminated the relevant judicial proceedings. The administrative decision before the court denied respondent's application for surviving spouse's disability benefits on the ground that she had not satisfied the pertinent regulatory requirement (that her impairment meet or equal an impairment in the Listing). The district court sustained, as supported by substantial evidence, the Secretary's finding that respondent had not satisfied that requirement. Pet. App. 16a. But instead of affirming the Secretary's decision based on that determination, in accordance with governing regulations, the court held that the Secretary must inquire into whether respondent is in fact unable to perform any gainful activity, taking into account her residual functional capacity. *Id.* at 17a-18a, 25a.

Neither the court of appeals nor respondent disputes that the district court's order effectively invalidated the Secretary's regulations in this case. Compare *Heckler v. Campbell*, 461 U.S. 458, 465-466 (1983). A district court order having that effect is a "final decision" from which the Secretary may take an appeal pursuant to 28 U.S.C. 1291. The Secretary is not divested of his right to appeal the order simply because the district court, in addition to and as a consequence of those rulings, remanded the cause to the Secretary for a rehearing under different legal standards that the court itself imposed. The subject of the Secretary's appeal is the district court's rejection of the final decision of the Secretary that was before the court on judicial review, not the court's further action in remanding the matter to the Secretary to render a new decision. This case therefore differs from those in which a court remands a matter to an agency for the receipt of new evidence before the court addresses the merits of the particular administra-

tive decision that is pending on judicial review.<sup>10</sup> A remand of the latter sort occurs at an interlocutory stage of the judicial proceeding; it is nonappealable because it precedes the court's final adjudication of the subject of the civil action (the validity of the administrative decision). An appeal at that stage could challenge only the remand itself, not any legal rulings by the court on the merits of the administrative decision.

The Secretary's right of appeal in circumstances like those presented here is supported by the text and structure of 42 U.S.C. 405(g), as well as by the principles that govern judicial review of agency action and inform this Court's construction of 28 U.S.C. 1291.

**I. THE TEXT AND STRUCTURE OF 42 U.S.C. 405(g) ESTABLISH THAT THE DISTRICT COURT'S ORDER IS A FINAL JUDGMENT FROM WHICH THE SECRETARY MAY APPEAL UNDER 28 U.S.C. 1291**

The text and structure of 42 U.S.C. 405(g) establish that the court of appeals had jurisdiction of the Secretary's appeal in this case. Indeed, Congress has specified in Section 405(g) that a district court decision such as that at issue here is a "judgment" that is "final" and subject to appellate review "in the same manner as the judgment in other civil cases," even though the court, as an aspect of its relief, remands the cause to the Secretary for a hearing under different legal or evidentiary standards. This conclusion is reinforced by Congress's identification in Section 405(g) of certain other remands that do *not* follow from the court's ruling on the validity of the Secretary's decision, but instead are intended to furnish an opportunity for supplementation or clari-

<sup>10</sup> The prior Third Circuit cases cited by the panel below in which jurisdiction under 28 U.S.C. 1291 was found lacking involved appeals from such orders, which remanded the case to the Secretary pursuant to the sixth sentence of 42 U.S.C. 405(g), discussed at pages 21-22, *infra*. See Pet. App. 5a, citing *Mayersky v. Celebrezze*, 353 F.2d 89 (3d Cir. 1965), and *Marshall v. Celebrezze*, 351 F.2d 467 (3d Cir. 1965).

fication of the administrative record and decision. The Secretary, like the claimant, may not appeal the latter type of order under 28 U.S.C. 1291 because it does not dispose of the merits of the cause of action for judicial review of the Secretary's decision. The text of Section 405(g) thus furnishes a bright line between those district court orders the Secretary may appeal and those he may not. That bright line should be given effect in this case.

A. Section 405(g) establishes a simple, expeditious, and carefully tailored procedure by which claimants may invoke the jurisdiction of district courts in Social Security cases. That procedure serves to circumscribe the role of the courts in matters arising under the Social Security Act and, correspondingly, to preserve and respect the primary jurisdiction of the Secretary in administering the massive benefit programs established by the Act—both in the formulation of broad policies (see 42 U.S.C. 405(a); *Bowen v. Yuckert*, 482 U.S. at 145) and in the adjudication of individual claims for benefits. *Weinberger v. Salfi*, 422 U.S. 749, 765-767 (1975).

Consistent with this legislative scheme, Section 405(g) does not create an ordinary civil cause of action against the United States for a money judgment in the amount of benefits allegedly owing under the Social Security Act. Nor does the statute authorize a trial de novo of the sort that would be conducted in the adjudication of an ordinary civil cause of action. To the contrary, Section 405(g) authorizes a special and limited form of civil action: an action for judicial review of the Secretary's final decision on the plaintiff's claim for benefits. The court's review and decision must be based on the record developed by and presented to the Secretary during the four-stage administrative review process. It is during that administrative process, not on judicial review, that the claimant has an opportunity for a de novo evidentiary hearing. 42 U.S.C. 402(b)(1) (1982 & Supp. IV 1986). As a result, the subject matter of the civil action

authorized by 42 U.S.C. 405(g) is not the plaintiff's underlying monetary claim for benefits under the Social Security Act, but rather the validity of the Secretary's final decision disposing of that claim.

This character of a civil action under Section 405(g) is demonstrated by the statutory text in a number of respects.<sup>11</sup> The first sentence of Section 405(g) provides that "[a]ny individual, after any final decision of the Secretary made after a hearing to which he was a party, \* \* \* may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Secretary may allow." The third sentence requires the Secretary, as part of his answer to the complaint, to "file a certified copy of the transcript of the [administrative] record including the evidence upon which the findings and decision complained of are based." These two sentences confirm that (i) the subject of the civil action is the "final decision" (and supporting findings) of the Secretary that the plaintiff has "complained of," (ii) the scope of the civil action is limited to "a review of such decision," and (iii) the only record on which the court may base its review is the record relied upon by the Secretary and furnished by him to the court.<sup>12</sup>

The fourth sentence of Section 405(g) both confers adjudicatory power on the court and limits that power. This sentence states that the district court "shall have

<sup>11</sup> Section 405(g) is reproduced in an appendix to this brief. In that appendix, we have numbered the sentences of Section 405(g) sequentially, setting off by brackets the numerical designations we have added. See App., *infra*, 1a-2a.

<sup>12</sup> Consistent with these provisions and the language in the fourth sentence of Section 405(g) authorizing a district court to enter a judgment only "upon the pleadings and transcript of the record," the district courts typically decide cases under Section 405(g) on cross-motions for summary judgment or a substantially equivalent procedure. See 4 *Social Security Law and Practice* §§ 56:26-56:31 (1987).

power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Secretary, with or without remanding the cause for a rehearing." This language aptly describes what the district court did in this case: the court "affirm[ed]" the Secretary's decision insofar as it found that respondent did not satisfy the requirement of the governing regulations by showing an impairment that meets or equals the Listing; the court "modif[ied]" or "revers[ed]" the Secretary's decision insofar as it denied respondent's claim on that basis; and the court then "remand[ed] the cause for a rehearing," in which the Secretary must apply a legal standard other than the one set forth in the regulations. The text and background of Section 405(g) indicate that the Secretary may appeal such an order.

As an initial matter, Congress's use of the term "judgment" in the fourth sentence of Section 405(g) to describe the disposition that the district court is empowered to make indicates in itself that the Secretary may appeal such an order under 28 U.S.C. 1291. The word "judgment" is a term of art that typically connotes the final disposition of a case, see 6 J. Moore, W. Taggart & J. Wicker, *Moore's Federal Practice* ¶ 54.02, at p. 54-22 & nn. 2, 3 (2d ed. 1988), and an order that so "ends the litigation on the merits" may be appealed by the party aggrieved, pursuant to 28 U.S.C. 1291. *Catlin v. United States*, 324 U.S. at 233.

There is, moreover, particular reason to believe that Congress understood when it enacted Section 405(g) in 1939<sup>13</sup> that the term "judgment" connotes an order from which an appeal lies. Rule 54(a) of the Federal Rules of Civil Procedure expressly provides that the term "judgment" "includes a decree and any order from which an appeal lies." The Federal Rules, including Rule 54(a), became effective in 1938 (Fed. R. Civ. P. 86(a); 308

<sup>13</sup> Act of Aug. 10, 1939, ch. 666, § 201, 53 Stat. 1368.

U.S. at 653, 732, 766), less than one year before Congress enacted Section 405(g). Rule 1 of the Civil Rules provides, as it did in 1938 (308 U.S. at 663), that the Rules govern the procedure "in all suits of a civil nature," language necessarily encompassing the suits under the Social Security Act that Congress authorized when it enacted Section 405(g) in 1939. See *Califano v. Yamasaki*, 442 U.S. 682, 700 (1979). Furthermore, under the Rules Enabling Act, the Rules did not take effect until the close of the 1938 Session of Congress, the Session in which they had been reported to Congress by the Attorney General. See Act of June 19, 1934, ch. 651 § 2, 48 Stat. 1064, codified as amended at 28 U.S.C. 2072-2074. It is therefore reasonable to conclude that Congress intended the term "judgment" in Section 405(g) to have the same meaning as that term had recently and definitively been given under the Rules governing procedure in civil actions generally. See *Sibbach v. Wilson & Co.*, 312 U.S. 1, 14-16 (1941). Thus, the straightforward reading of the fourth sentence of Section 405(g) is that a district court has power to enter a "judgment" modifying or reversing the decision of the Secretary, and that the judgment is an appealable order even if the court, as a consequence of its legal ruling, also remands the cause to the Secretary for a rehearing.

Any doubt on this question would appear to be eliminated by the eighth sentence of 42 U.S.C. 405(g). The eighth sentence provides that "[t]he judgment of the court shall be final except that it shall be subject to review in the same manner as a judgment in other civil actions." Because the fourth sentence of Section 405(g) makes clear that the term "judgment" encompasses an order modifying or reversing the Secretary's decision whether or not the court also remands the cause to the Secretary, the existence of a remand does not detract from the "final[ity]" of the judgment for purposes of the eighth sentence. As noted above, it is undisputed that a final judgment is an appealable "final decision"

within the meaning of 28 U.S.C. 1291. See *Midland Asphalt Corp. v. United States*, 109 S. Ct. at 1497.

In any event, the eighth sentence further states that a judgment under 42 U.S.C. 405(g) "shall be subject to review in the same manner as a judgment in other civil actions." While the legislative history does not elaborate on this provision,<sup>14</sup> it apparently was intended only to clarify *where* an appeal of the district court's concededly final judgment may be taken, not *whether* an appeal lies. At the time Section 405(g) was enacted, the usual "manner" in which a party obtained review of a judgment in a civil action was by appeal to the court of appeals pursuant to what is now 28 U.S.C. 1291. But when a district court held a provision of the Social Security Act unconstitutional, review was by direct appeal to this Court, pursuant to the special jurisdictional statute passed in 1937, only two years before 42 U.S.C. 405(g) was enacted. Act of Aug. 24, 1937, § 2, ch. 754, 50 Stat. 752, 28 U.S.C. 1252 (1982); see, e.g., *Fleming v. Nestor*, 363 U.S. 603, 604 (1960); *Bowen v. Owens*, 476 U.S. 340, 345 (1986).<sup>15</sup>

<sup>14</sup> The House and Senate Reports on the 1939 amendments summarized the provisions of Section 405(g) in identical terms, without specific reference to the eighth sentence. The Reports explained the need for Section 405(g) by noting that the then-present provisions of the Act "[did] not specify what remedy, if any, is open to a claimant in the event his claim to benefits is denied by the [Social Security] Board," and that "[t]he provisions of this subsection are similar to those made for the review of decisions of many administrative bodies." H.R. Rep. No. 728, 76th Cong., 1st Sess. 43 (1939); S. Rep. No. 734, 76th Cong., 1st Sess. 52 (1939).

<sup>15</sup> This interpretation of the eighth sentence as relating to the court to which an appeal may be taken is supported by a section-by-section analysis prepared by the responsible House Subcommittee following enactment of the Social Security Amendments of 1977, Pub. L. No. 95-216, 91 Stat. 1509. In describing Section 405(g), which was not amended by the 1977 amendments, the Subcommittee stated: "The judgment shall be final except that it shall be subject to review in the same manner as other civil actions; in a court of appeals and in the Supreme Court under certain circum-

Thus, the eighth sentence of Section 405(g) preserved the alternative avenues of appellate review,<sup>16</sup> and, read in connection with the fourth sentence, firmly establishes that the Secretary may appeal the district court's order here.

This conclusion is supported by the other provisions of Section 405(g) that describe the nature and scope of the civil action it authorizes. As explained above, those provisions make clear that it is not the underlying claim for benefits, but rather the particular final decision of the Secretary that the claimant has "complained of" in his action for judicial review, that is the subject of the civil action. Accordingly, where, as here, the district court enters an order holding that particular decision to have been erroneous and then remands to the Secretary for a rehearing, the court's order ends the relevant litigation on the merits. After the further proceedings on remand, the Secretary will render a *new* decision (based on new findings), in conformity with the legal rulings in the district court's order, and it is that *new* decision, not the one the district court previously set aside, that will be the subject of any further proceedings for judicial review that the claimant may institute under Section 405(g). Because the two rounds of judicial proceedings are conceptually and legally distinct (despite their relation to the same underlying claim for benefits), it is not surprising that Congress, in enacting Section 405(g), deemed the order that ends the first round to be a final judgment

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stances." Subcomm. on Social Security of the House Comm. on Ways & Means, 95th Cong., 2d Sess., *The Social Security Amendments of 1977: Brief Summary of Major Provisions and Detailed Comparison With Prior Law* 26 (Comm. Print 1977).

<sup>16</sup> Because the direct appeal statute was repealed by the Act of June 27, 1988, Pub. L. No. 100-352, § 1, 102 Stat. 662, the exclusive "manner" by which the Secretary now may obtain appellate review of the district court's order in a Social Security case is in the court of appeals, pursuant to 28 U.S.C. 1291.

that is "subject to review in the same manner as a judgment in other civil actions."<sup>17</sup>

B. Respondent ignores the fourth and eighth sentences of 42 U.S.C. 405(g), which speak directly to the appealability issue, and focuses instead (Br. in Opp. 22-27, 29-31, 52-55) on the sixth sentence. In her view, the sixth

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<sup>17</sup> A number of courts have held that a Social Security claimant may not take an appeal under 28 U.S.C. 1291 even from an order that remands the cause to the Secretary after reaching the merits of the Secretary's decision, since the claimant may seek judicial review of the new decision rendered by the Secretary on remand if that decision is adverse to him. *Bohms v. Gardner*, 381 F.2d 283 (8th Cir. 1967), cert. denied, 390 U.S. 964 (1968); *Beach v. Bowen*, 788 F.2d 1399 (8th Cir. 1986); *Farr v. Heckler*, 729 F.2d 1426 (11th Cir. 1984); *Howell v. Schweiker*, 699 F.2d 524 (11th Cir. 1983). In doing so, the courts were agreeing with the government's position in those cases that no appeal would lie.

Under the rationale presented in this part of our brief, which relies on the language of Section 405(g) deeming an order like that entered here to be a final judgment subject to appeal in the same manner as a judgment in other civil actions, such decisions may well be appealable by a claimant who could show that he was aggrieved by a ruling of law by the district court—*e.g.*, that if the court's ruling was in error he was entitled to outright reversal of the Secretary's decision. Such appeals, however, would surely be infrequent. (In this case, for instance, respondent did not cross-appeal from the district court's decision upholding the Secretary's determination that she did not show an impairment that met or equaled the Listing.) This is so for three reasons. First, the district court's order finding the Secretary's decision to have been legally erroneous and remanding the cause to the Secretary for further proceedings generally represents a substantial victory for a claimant. Second, any additional gains from a time-consuming appeal are unlikely, because a district court's conclusion that further proceedings should be conducted by the Secretary before there is a final resolution of the claim for benefits would be subject to only the most limited review by a court of appeals. Third, and by way of contrast, the claimant has a very good prospect of prevailing in the proceedings on remand: we have been informed by the Department of Health and Human Services that, following additional development of the record on remand, benefits are awarded in approximately 65% of Social Security cases that are remanded to the Secretary.

sentence suggests that *all* orders including a remand to the Secretary are interlocutory and nonappealable because in any remand to the Secretary governed by that sentence, the Secretary is required to file his amended findings and decision with the court. Respondent misapprehends the statutory scheme. In fact, the sixth sentence of Section 405(g) supports our position. It identifies district court orders that (in contrast to the category of orders characterized as a "judgment" and exemplified by that at issue here) are *not* appealable under 28 U.S.C. 1291 because they only remand the case to the Secretary (for the receipt of new evidence or for a comparably interlocutory undertaking) and do not reach the validity of the Secretary's decision on the merits.

The sixth sentence of Section 405(g) contains two distinct authorizations for the district court to order a remand to the Secretary in circumstances *other* than those encompassed by the fourth sentence—*i.e.*, other than those in which the court reaches the merits of the validity of the Secretary's decision. The first permits the district court, "on motion of the Secretary made for good cause shown before he files his answers," to remand the case to the Secretary for "further action." This mechanism affords the Secretary an opportunity to respond to new evidence or allegations that have come to light since the Appeals Council rendered its decision denying the claim. It also permits the Secretary to correct deficiencies in the record or in his findings and decision that are noticed during preparation of the defense of the administrative decision. Compare *Ford Motor Co. v. NLRB*, 305 U.S. 364, 372-373 (1939).

The other authorization in the sixth sentence permits the court, at any time, to order that "additional evidence" be taken before the Secretary, but only if there is a showing of "new" and "material" evidence and of good cause for the failure to incorporate it into the record in a prior proceeding. Because all evidence bearing on the claim for benefits is received and weighed by the Secretary in the

first instance at all stages of the claims-adjudication process, it is consistent with the statutory scheme for a case pending on judicial review to be remanded to the Secretary for any necessary supplementation of the record—and for the Secretary to make additional or modified findings and to render a modified decision in light of that evidence—rather than to have the court itself receive and weigh the new evidence in the first instance.

The concluding portion of the sixth sentence of Section 405(g) requires the Secretary, on a remand covered by that sentence, to file with the court any additional or modified findings of fact or decision. Only after such reconsideration can the court properly pass on the validity of the Secretary's decision (as so modified) and affirm, modify, or reverse it. An order remanding a case to the Secretary pursuant to the sixth sentence that is entered *before* the court passes on the validity of the Secretary's decision is not a "final decision" and is therefore not subject to appeal by either the Secretary or the claimant under 28 U.S.C. 1291. *Cohen v. Perales*, 412 F.2d 44, 48 (5th Cir. 1969), rev'd on other grounds, 402 U.S. 389 (1971); *Dalto v. Richardson*, 434 F.2d 1018 (2d Cir. 1970), cert. denied, 401 U.S. 979 (1971); see also cases cited in note 10, *supra*.

Contrary to respondent's contention (Br. in Opp. 25, 27, 52-53), the order in the instant case was not governed by the limited remand authority in the sixth sentence of Section 405(g). Instead, the district court remanded the case to the Secretary only as a consequence of its holding on the merits that the Secretary's decision was legally erroneous. The Secretary therefore was entitled to appeal that order, as contemplated by the fourth and eighth sentences of Section 405(g). Other courts of appeals have consistently recognized the distinction between those orders remanding the entire cause to the Secretary as a consequence of the court's ruling that the Secretary's decision was unlawful, and pure remand orders, which

are governed by and subject to the distinct limitations in the sixth sentence of Section 405(g). *Aubeuf v. Schweiker*, 649 F.2d 107, 115-116 (2d Cir. 1981); *Carter v. Schweiker*, 649 F.2d 937, 942 (2d Cir. 1981); *Kane v. Heckler*, 731 F.2d 1216, 1220 (5th Cir. 1984); *Garfield v. Schweiker*, 732 F.2d 605, 610 n.8 (7th Cir. 1984); *Bauzo v. Bowen*, 803 F.2d 917, 926 (7th Cir. 1986); *Diorio v. Heckler*, 721 F.2d 726, 729 (11th Cir. 1983). See also J. Mashaw, *et al.*, *Social Security Hearings and Appeals* 130 (1978) [hereinafter *Social Security Hearings and Appeals*] (the fourth sentence of Section 405(g) differs from the sixth sentence and "gives the court discretion to remand in cases where the Secretary's decision is found to be unsupported by substantial evidence or where some legal error, substantive or procedural, has been committed"); H.R. Rep. No. 100, 96th Cong., 1st Sess. 13 (1979) (report on 1980 amendments to the sixth sentence of Section 405(g)).<sup>18</sup>

<sup>18</sup> The volume *Social Security Hearings and Appeals*, upon which this Court has relied (see *Heckler v. Campbell*, 461 U.S. at 461 & n.2), is essentially identical to a report on the claims-adjudication process that led to the amendment of the sixth sentence of Section 405(g) in 1980. Center for Administrative Justice, *Final Report: Study of Social Security Administration Hearing System* 262 (Oct. 1977). Prior to 1980, the sixth sentence did not require a showing of good cause for a remand on the Secretary's motion and did not require a showing of materiality or good cause for the claimant's failure to introduce new evidence in a prior proceeding. See 42 U.S.C. 405(g) (1976). The report recommended (Center for Administrative Justice, *supra*, at 263-273) that the sixth sentence be amended to restrict such remands, in order to improve the quality of decision-making by the ALJs and the Appeals Council and to encourage timely production of evidence by claimants. Accord *Social Security Hearings and Appeals* at 130-136.

Congress adopted this recommendation by amending the first portion of the sixth sentence to read as it now does. Social Security Disability Amendments of 1980, Pub. L. No. 96-265, § 307, 94 Stat. 458. The House Report explained that this amendment of the sixth sentence was "not to be construed as a limitation of judicial remands currently recognized under the law in cases in which the

In respondent's view (Br. in Opp. 22-23, 29-32, 39-40), our submission that the order in this case is a final judgment subject to appeal by the Secretary is inconsistent with *Sullivan v. Hudson*, 109 S. Ct. 2248 (1989). That case, however, involved the award of an attorney's fees under the Equal Access to Justice Act (EAJA), 28 U.S.C. 2412(d)(1)(A), not appellate jurisdiction. The Court held in *Sullivan v. Hudson* that proceedings before the Secretary on remand from a district court are sufficiently related to the civil action for judicial review under 42 U.S.C. 405(g) to permit a court, as part of an attorney's fees award under EAJA, to award fees for services rendered before the Secretary on remand. The Court held that a claimant is not, as a general matter, a prevailing party when a district court remands the matter to the Secretary, and it noted that under EAJA, an application for attorney's fees must be filed "within thirty days of final judgment in the action." 28 U.S.C. 2412(d)(1)(B). 109 S. Ct. at 2254-2255. In these circumstances, the Court noted that "for purposes of the EAJA," the claimant's status as a prevailing party and the final judgment in the civil action would often be dependent on the successful completion of the proceedings on remand to the Secretary. *Id.* at 2255.

The Court in *Sullivan v. Hudson* did not address the distinct question whether an order effectively setting aside the Secretary's decision and remanding the cause to the Secretary for redetermination is a final judgment for purposes of appealability under 28 U.S.C. 1291. Nor did it address the specific language in the fourth and eighth sentences of Section 405(g) that refers to such

Secretary has failed to provide a full and fair hearing, to make explicit findings, or to have correctly apply [*sic*] the law and regulations." H.R. Rep. No. 100, *supra*, at 13. In at least the first and third of these examples, the district court has held the Secretary's decision unlawful, and those examples therefore would be covered by the fourth sentence of Section 405(g).

an order as a "judgment" that is "final" and "subject to review in the same manner as a judgment in other civil actions." There is, accordingly, no inconsistency between the holding in *Sullivan v. Hudson* that attorney's fees may be awarded after a remand and our submission here that the district court's order is a final judgment within the meaning of 42 U.S.C. 405(g) and is, for that reason, appealable under 28 U.S.C. 1291. See *Budinich v. Becton Dickinson & Co.*, 486 U.S. 199 (1988) (decision on merits is appealable under 28 U.S.C. 1291 even though recoverability of attorney's fees remains to be decided).<sup>19</sup>

<sup>19</sup> The Court took the Secretary to have conceded in *Sullivan v. Hudson* (apparently on the basis of the sixth sentence of Section 405(g)) that a district court order that includes a remand to the Secretary is not a final determination of the civil action and that the district court "retains jurisdiction to review any determination rendered on remand." 109 S. Ct. at 2255, quoting Pet. Br. 16-17. The cited sentences of our opening brief, which essentially restated the respondent's position, were somewhat ambiguous. But we specifically argued in our reply brief (at 14-16) that an order holding the Secretary's decision unlawful and remanding for new proceedings under a different legal standard is governed not by the sixth sentence, but by the fourth and eighth sentences, which render the order a "final judgment" that effectively terminates the judicial proceedings for review of the particular decision of the Secretary before the court. We also stated (Reply Br. 16-17 n.8) our position that the Secretary may appeal such an order. As a result, our submission in *Sullivan v. Hudson*, taken as a whole, did not concede that an order such as that at issue here is a non-final decision, especially for purposes of the Secretary's right of appeal. Nor did it concede that, by operation of the sixth sentence of Section 405(g), the district court automatically retains jurisdiction to conduct plenary review of any new determination rendered by the Secretary after a remand that is not governed by that sentence. Although a district court may inherently retain some jurisdiction for limited purposes after a remand—e.g., to assure that its prior mandate is carried out or to award attorney's fees if the claimant prevails in the proceedings on remand (109 S. Ct. at 2254-2255)—that jurisdiction does not confer power on the court to award relief "of a different kind or on a different principle." *Dugas v. American Surety Co.*, 300 U.S. 414, 428 (1937); see

## II. THE RIGHT OF THE SECRETARY TO APPEAL IS SUPPORTED BY GENERAL PRINCIPLES GOVERNING THE CONSTRUCTION OF 28 U.S.C. 1291 AND THE SCOPE OF JUDICIAL REVIEW OF AGENCY ACTION

The conclusion that 42 U.S.C. 405(g) renders the district court's order in this case a final, appealable judgment is strongly supported by established principles governing judicial review of agency action and the appealability of district court orders under 28 U.S.C. 1291 generally. Indeed, Section 405(g) is but a particular statutory expression of those general principles. The common and preferred practice, when a court finds agency action unlawful and sets it aside, is for the court to remand the matter to the agency for further proceedings. That practice limits judicial intrusion into the administrative process and assures respect for the autonomy and distinct responsibilities of the agency charged by Congress with administering the statute. It would be a perverse result if a court's inclusion of a remand to the agency in its order holding the agency's action unlawful were to *divest* the agency of its right to seek appellate review of the court's order, especially since such an order may have seriously adverse consequences for the agency and the public. Fortunately, although the Court has not specifically addressed the jurisdictional issue, the actual practice of the courts, including this Court, has been to entertain appeals in such cases.

Of particular relevance here, the Court previously has granted review and decided the merits in a Social Security case in which the district court held erroneous the Secretary's decision denying benefits and remanded for a new hearing. See *Richardson v. Perales*, 402 U.S. 389 (1971). Although the Court recited the facts of the

*Chemical Leaman Tank Lines, Inc. v. United States*, 446 F. Supp. 721, 724 (D.D.C. 1978) (three-judge court). Any such retention of jurisdiction therefore cannot cut off the Secretary's right to appeal the order insofar as it held his prior decision unlawful.

district court's ruling and remand, *id.* at 397-398, it did not discuss the jurisdictional issue. But because this Court's jurisdiction under 28 U.S.C. 1254(1) depended on whether the case was properly "in" the court of appeals under 28 U.S.C. 1291 (see *United States v. Nixon*, 418 U.S. 683, 690, 692 (1974))—and because the jurisdictional issue *was* extensively discussed by the court of appeals (*Cohen v. Perales*, 412 F.2d 44, 48-49 (5th Cir. 1969))—the Court presumably would have felt obligated to address the issue if it had reservations about the court of appeals' jurisdictional holding.<sup>20</sup> Consistent with *Perales*, which is virtually indistinguishable from this case, the courts of appeals have, until quite recently, been unanimous in their view that the Secretary may appeal such an order in an action under 42 U.S.C. 405(g).<sup>21</sup>

<sup>20</sup> Similarly, in *Traynor v. Turnage*, 485 U.S. 535 (1988), one of the appellate decisions before the Court was rendered on an appeal by the Administrator of Veterans Affairs from a district court order that held the Administrator's order unlawful and remanded to the Administrator for further proceedings. *Id.* at 540; see *McKelvey v. Walters*, 596 F. Supp. 1317, 1325 (D.D.C. 1984).

<sup>21</sup> See *Lopez Lopez v. Secretary of HEW*, 512 F.2d 1155, 1156 (1st Cir. 1975); *Colon v. Secretary of HHS*, 877 F.2d 148, 149-151 (1st Cir. 1989); *McGill v. Secretary of HHS*, 712 F.2d 28, 29-30 (2d Cir. 1983) (dictum), cert. denied, 465 U.S. 1068 (1984); *Souch v. Califano*, 599 F.2d 577, 578 n.1 (4th Cir. 1979) (but see *Harper v. Bowen*, 854 F.2d 678 (4th Cir. 1988) (dismissing appeal in particular circumstances)); *Gold v. Weinberger*, 473 F.2d 1376, 1378 (5th Cir. 1973) (but see *Haywood v. Bowen*, No. 88-1280 (Nov. 30, 1988), 862 F.2d 873 (1988) (Table) (dismissing appeal without discussing court's own prior decision in *Perales*)); *Edmond v. Secretary of HHS*, No. 89-3161 (6th Cir. Apr. 19, 1989); *Jamieson v. Folsom*, 311 F.2d 506, 507 (7th Cir.), cert. denied, 374 U.S. 487 (1963); *Crowder v. Sullivan*, No. 89-2681 (7th Cir. Mar. 5, 1990); *Gardner v. Moon*, 360 F.2d 556, 558 n.2 (8th Cir. 1966) (but see *McCoy v. Schweiker*, 683 F.2d 1138, 1141 n.2 (8th Cir. 1982) (en banc) (dictum)); *Stone v. Heckler*, 722 F.2d 464, 466-468 (9th Cir. 1983); *Ensey v. Richardson*, 469 F.2d 664 (9th Cir. 1972); *Paluso v. Mathews*, 573 F.2d 4, 7-8 (10th Cir. 1978) (Black Lung case); *Davidson v. Secretary of HHS*, No. 88-1472 (10th Cir. Oct. 12, 1989); *Pickett v. Bowen*, 833 F.2d 288, 290-291 (11th Cir. 1987); *Huie v. Bowen*, 788 F.2d 698, 701-703 (11th Cir. 1988) (but

Equally significant are decisions involving judicial review of agency action directly in a court of appeals under the Hobbs Act, 28 U.S.C. 2341 *et seq.*, which authorizes this Court to review the "final judgment" of the court of appeals, 28 U.S.C. 2350.<sup>22</sup> The Court, without questioning the finality of the decision below or the Court's jurisdiction to review it, has on a number of occasions granted review of decisions in which the court of appeals held the particular agency action unlawful and remanded the cause to the agency for further proceedings. See, e.g., *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 535-536 (1978); *ICC v. Brotherhood of Locomotive Engineers*, 482 U.S. 270 (1987), re-

see *Jordan v. Heckler*, 721 F.2d 349 (11th Cir. 1983) (dismissing appeal without discussion of *Perales*, which was binding precedent in Eleventh Circuit); *Biddle v. Heckler*, 721 F.2d 1321 (11th Cir. 1983) (same)). Even prior to the earliest of these decisions—*Jamieson, Gardner and Perales*—several courts of appeals, without addressing the jurisdictional issue, entertained appeals in similar circumstances. See *Hobby v. Hodges*, 215 F.2d 754 (10th Cir. 1954); *Ewing v. Gardner*, 185 F.2d 781 (6th Cir. 1950); *Social Security Board v. Warren*, 142 F.2d 974 (8th Cir. 1944).

The courts of appeals also have entertained appeals in Medicare cases in the identical situation under 42 U.S.C. 1395oo(f), where the district court held erroneous the decision of the Provider Reimbursement Review Board and remanded the cause to the Board for further proceedings. See, e.g., *Community Hospital of Roanoke v. HHS*, 770 F.2d 1257 (4th Cir. 1985); *Daviess County Hospital v. Bowen*, 811 F.2d 338, 341-342 (7th Cir. 1987); *Edgewater Hospital, Inc. v. Bowen*, 857 F.2d 1123 (7th Cir. 1988); *Adams House Health Care v. Bowen*, 817 F.2d 587, 589 (9th Cir. 1987), vacated on other grounds, 485 U.S. 1018 (1988); *North Broward Hospital District v. Bowen*, 808 F.2d 1405, 1408 n.3 (11th Cir. 1987), vacated on other grounds, 485 U.S. 1018 (1988). See also *Gueory v. Hampton*, 510 F.2d 1222 (D.C. Cir. 1974) (following *Perales* in case involving remand to Civil Service Comm'n), reaffirmed in *Occidental Petroleum Corp. v. SEC*, 873 F.2d 325, 330-331 (D.C. Cir. 1989).

<sup>22</sup> 28 U.S.C. 2350 also permits this Court to review "[a]n order granting or denying an interlocutory injunction" under 28 U.S.C. 2349(b).

versing 761 F.2d 714, 725 (D.C. Cir. 1985). The Court should not "disregard the implications of an exercise of judicial authority assumed to be proper for [many] years." *Brown Shoe Co. v. United States*, 370 U.S. 294, 307 (1962). This Court's practical experience in the exercise of its authority to review "final judgment[s]" under 28 U.S.C. 2350 therefore weighs heavily in favor of recognizing a comparable authority in the courts of appeals under 28 U.S.C. 1291 to review district court decisions holding agency action unlawful and remanding to the agency for further proceedings. Moreover, the Court's articulation and application of the finality requirement of 28 U.S.C. 1291 and of similar statutes in other settings firmly buttress that result.

A. By its terms, Section 1291 is not limited to orders that constitute the final judgment in the case. It vests the courts of appeals with jurisdiction of appeals from "all final decisions" of the district courts, a category that includes more than final judgments. Congress's use of the inclusive term "all"<sup>23</sup> manifests an intent to reach every order that, in context, possesses the requisite "indicia of finality" (*Brown Shoe Co. v. United States*, 370 U.S. 294, 308 (1962)) with respect to the party aggrieved and the matter disposed of by the order. Accordingly, the Court has made clear that "'a decision 'final' within the meaning of § 1291 does not necessarily mean the last order possible to be made in a case,'" *Mitchell v. Forsyth*, 472 U.S. at 524 (quoting *Gillespie v. United States Steel Corp.*, 379 U.S. at 152) and that the requirement of finality must be given a "practical rather than a technical construction." *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. at 546. The principle of finality, in short, "is not a technical concept of temporal or physical termination," but "the means for achieving a healthy legal system." *Cobbledick v. United States*, 309 U.S. 323, 326 (1940). And "[t]he consider-

<sup>23</sup> See *United States v. Monsanto*, 109 S. Ct. 2657, 2662 (1989).

ations that determine finality are not abstractions but have reference to very real interests—not merely of the immediate parties, but, more particularly, those that pertain to the smooth functioning of our judicial system.'" *Budinich v. Becton Dickinson & Co.*, 486 U.S. at 201 (quoting *Republic Natural Gas Co. v. Oklahoma*, 334 U.S. 62, 69 (1948)).

Heretofore, the Court has considered the finality requirement of 28 U.S.C. 1291 only in the context of orders entered by a district court during or at the conclusion of ordinary civil or criminal litigation conducted entirely before the district court itself. In that setting, the "practical" rather than "technical" construction of Section 1291 has been most evident in the "collateral order" doctrine, which recognizes a small class of decisions immediately appealable under Section 1291 even though they do not terminate the proceedings in the district court. The class consists of decisions that "finally determine claims of right separate from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. at 546. See, e.g., *Midland Asphalt Corp. v. United States*, 109 S. Ct. at 1497. Under the common formulation of the collateral order doctrine, an order is immediately appealable if it (1) "conclusively determine[s] the disputed question," (2) "resolve[s] an important issue completely separate from the merits of the action," and (3) is "effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand v. Livesay*, 437 U.S. at 468.

The Court has also made clear, however, that orders satisfying the three specific requirements of the collateral order doctrine do not constitute the only instances in which the principle of practical finality permits an appeal from an order that does not completely or formally terminate the litigation. For example, in *Moses*

*H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1 (1983), the Court held that the court of appeals had jurisdiction of an appeal from a district court order staying proceedings pending resolution of a state-court suit raising the identical issue. The Court found the order to be a "final decision" because, as a practical matter, it meant there would be no further litigation of the issue in the federal forum, and the plaintiff therefore was "effectively out of court." 460 U.S. at 9-10.<sup>24</sup> The Court relied on its similar ruling in *Idlewild Liquor Corp. v. Epstein*, 370 U.S. 713, 715 n.2 (1962), that the court of appeals had jurisdiction over a district court order granting a stay under the *Pullman* abstention doctrine,<sup>25</sup> even though such an order is entered with the expectation that the federal litigation will resume if the plaintiff does not obtain relief in state court on state-law grounds. 460 U.S. at 9-10.<sup>26</sup>

B. This case differs from the cases just discussed. The order at issue here was not entered in the course of ordinary civil or criminal litigation, in which the courts determine all legal and factual issues in the first instance and in which the trial and reviewing bodies are both components of the judicial system. Instead, the order was entered in the different context of judicial review of final agency action, in which the primary adjudicatory proceedings take place before the agency, subject to judicial review limited in both scope and time. The formulation of principles of appellate jurisdiction in this

<sup>24</sup> The Court concluded, in the alternative, that the order was appealable as a collateral order. 460 U.S. at 11-12.

<sup>25</sup> *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496 (1941).

<sup>26</sup> See also *Brown Shoe Co. v. United States*, 370 U.S. at 307-311; *Foray v. Conrad*, 47 U.S. (6 How.) 201, 203 (1848); cf. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 477-485 (1975) (upholding this Court's jurisdiction under 28 U.S.C. 1257 to review a state appellate court judgment that remanded a case for trial or other proceedings); *ASARCO Inc. v. Kadish*, 109 S. Ct. 2037, 2042 (1989) (same).

setting must, accordingly, respect the "division of function which the legislature has made between the administrative body and the court of review." *Scripps-Howard Radio, Inc. v. FCC*, 316 U.S. 4, 10 (1942).

The agency action under review in this case—the "final decision" of the Secretary (rendered through the ALJ and Appeals Council) on respondent's claim for benefits—was itself the end product of distinct adjudicatory proceedings, and it embodied the Social Security Administration's considered judgment on all issues of fact and law bearing on respondent's claim for benefits. When a court holds such a decision unlawful, the agency is immediately aggrieved, whether or not the court remands the cause to the agency for further proceedings. Due respect for a coordinate Branch—and for its formal and considered decisions—calls for the agency to have a correspondingly immediate right of appeal, so it may seek reinstatement, affirmance, and effectuation of its decision.<sup>27</sup> Standards of finality under 28 U.S.C. 1291,

<sup>27</sup> The Secretary's right to appeal the district court order at issue here is consistent with the origins of judicial review of agency action and the various procedures available for obtaining it. Judicial review is most firmly rooted in the common law writ of mandamus, by which a court could compel an executive officer to perform a duty. See L. Jaffe, *Judicial Control of Administrative Action* 176-192, 320-326 (1965); see, e.g., *Kendall v. United States*, 37 U.S. (12 Pet.) 524 (1838). There is little doubt that an order granting a writ of mandamus is immediately appealable, see *Columbia Insurance Co. v. Wheelwright*, 20 U.S. (7 Wheat.) 534 (1822), even if compliance by the officer requires performance of administrative duties similar to those conducted on "remand" under more modern and familiar forms of judicial review.

The district court order at issue here also closely resembles—and indeed had the effect of—an injunction, which is subject to immediate appeal even at an interlocutory stage of the proceedings. 28 U.S.C. 1292(a)(1). The order did more than simply remand the cause; it "directed" the Secretary to conduct further proceedings to inquire whether respondent can engage in any gainful activity (Pet. App. 18a). Cf. *Avery v. Secretary of HHS*, 762 F.2d 158, 160-161 (1st Cir. 1985) (class action). The order did not simply

as applied in conjunction with principles of judicial review of agency action, require that result as well: the district court's order in this case is appealable both because it terminates the proceedings for judicial review of the particular decision of the Secretary, and because recognition of the Secretary's right of appeal is consistent with the principles of practical finality underlying the collateral order doctrine and the Court's holdings in related contexts.

1. The subject of an action for judicial review under 42 U.S.C. 405(g) is the "final decision" of the Secretary that the plaintiff has "complained of," not the claim for benefits that was disposed of by the Secretary's decision. See pages 15-16, 20, *supra*. The Administrative Procedure Act (APA) embodies a similar principle with respect to judicial review of agency action generally. The APA, like 42 U.S.C. 405(g), does not create an ordinary cause of action in which all relevant proceedings concerning rates, licenses, benefit claims, rules, and other matters within the jurisdiction of an Executive Branch agency are conducted by the court itself as an original matter. The APA only affords a right to judicial review of "agency action" regarding those matters. 5 U.S.C. 702. In defining the scope of review, the APA states that "[t]he reviewing court shall \* \* \* hold unlawful and set aside agency action, findings and conclusions" that fail to satisfy the standards specified in the APA itself. 5 U.S.C. 706(2). It does not grant the courts authority to reach and decide the merits of the controversy underlying the agency action that has been set aside. *Camp*

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govern the conduct of the parties in connection with proceedings before the district court itself on matters unrelated to substantive issues in the case. See *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 108 S. Ct. 1133, 1138 (1988). Rather, it granted partial relief on the merits (by reversing the Secretary's decision insofar as it denied benefits in reliance on the Listing) and ordered further proceedings in a different forum. Compare *Baltimore Contractors, Inc. v. Bodinger*, 348 U.S. 176, 183 (1955).

*v. Pitts*, 411 U.S. 138, 142 (1973). See also *Burlington Northern, Inc. v. United States*, 459 U.S. 131, 141 (1982) ("federal court authority to reject Commission rate orders for whatever reason extends to the orders alone, and not to the rates themselves").

Consistent with this limited scope of judicial review, the Court has repeatedly held in a variety of administrative law settings that "the function of the reviewing court ends when an error of law is laid bare," because "[a]t that point the matter once more goes to the [agency] for reconsideration." *FPC v. Idaho Power Co.*, 344 U.S. 17, 20 (1952); accord *FPC v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 793 n.15 (1978); *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 145 (1940); *ICC v. Clyde S.S. Co.*, 181 U.S. 29, 32-33 (1901). A district court order faithful to this command therefore "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Van Cauwenberghe v. Biard*, 108 S. Ct. at 1949 (citation omitted). Accordingly, general principles of administrative law under the APA and of finality under 28 U.S.C. 1291 reinforce the conclusion evident from the text of 42 U.S.C. 405(g) standing alone—that the district court's order in this case was a "final decision" for purposes of 28 U.S.C. 1291 because it finally determined that the particular decision of the Secretary before the court on review was contrary to law.

If respondent's claim is again denied on remand and she seeks judicial review of that new decision, the district court may have occasion to consider issues bearing on respondent's claim for benefits again at a later date. But there can be no assurance that events will unfold in that manner. For one thing, respondent may be awarded benefits on remand under the legal standards mandated by the district court. And even if respondent's claim is again denied and she seeks judicial review of that denial, the focus of the judicial proceedings at that point will be on the validity of the Secretary's *second* decision, not the

first (which the court previously held unlawful); nor will it focus on respondent's underlying monetary claim for benefits. Any subsequent judicial proceedings will therefore be, in substance, a new civil action for judicial review under 42 U.S.C. 405(g). And the result would be no different if the district court, as a matter of judicial convenience, sought to keep the action open or even to "retain jurisdiction" so that any request by respondent for judicial review of the Secretary's new decision on remand would be treated as part of the prior action.<sup>28</sup> The particular form in which a court chooses to dispose of a case under 42 U.S.C. 405(g) and similar statutes cannot control the rights of the parties. Appealability under 28 U.S.C. 1291 is defined "in terms of categories," *Carroll v. United States*, 354 U.S. 394, 405 (1957), and "operational consistency and predictability in the overall operation of § 1291" require a "uniform rule." *Budinich v. Becton Dickinson & Co.*, 486 U.S. at 202. Under 42 U.S.C. 405(g), as well as general principles of administrative law, the category of judicial orders that hold agency action unlawful and set it aside end the relevant litigation for purposes of appeal. This is so even if the court then remands the matter to the agency for further proceedings, because in that event, the Secretary is "effectively out of court." *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. at 9, 10 (quoting *Idlewild Liquor Corp. v. Epstein*, 370 U.S. at 715 n.2).

2. The Secretary's right to appeal remains clear even if the proceedings before the Secretary and those before the court are regarded as separate chapters in the

<sup>28</sup> The district court's order in this case does not manifest any such intent. Pet. App. 25a. See *NLRB v. Wilder Mfg. Co.*, 454 F.2d 995, 998 (D.C. Cir. 1971) (unless court otherwise states, remand relinquishes jurisdiction); *Chemical Leaman Tank Lines, Inc. v. United States*, 446 F. Supp. at 724 (same); see note 19, *supra*.

broader controversy over respondent's underlying claim for benefits. Viewed from that perspective, the district court's order is appealable by reference to the factors the Court has articulated in fashioning the "collateral order" doctrine. Specifically, the district court's order has the requisite "indicia of finality" (*Brown Shoe Co. v. United States*, 370 U.S. at 308) because (i) it finally resolves the important legal issue of the validity of the Secretary's regulations governing surviving spouses' disability claims; (ii) that issue is separate from the factual issues (concerning respondent's residual functional capacity to perform gainful activity) that will be considered in the administrative proceedings ordered by the court; and (iii) there is no readily available and effective opportunity for the Secretary to challenge the court's invalidation of his regulatory approach at a later date.

a. In elaborating upon the collateral order doctrine, the Court has explained that the requirement of finality avoids the disruption of on-going proceedings in the trial court that would be occasioned by "piecemeal appellate review," and thereby promotes the "efficient administration of justice." *Flanagan v. United States*, 465 U.S. 259, 264 (1984). In addition, the rule "emphasizes the deference that appellate courts owe to the trial judge as the individual initially called upon to decide the many questions of law and fact that occur in the course of a trial," thereby respecting the "independence of the district judge, as well as the special role that individual plays in our judicial system." *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 374 (1981).

The weight of these considerations is different in the context of judicial review of agency action. Because the order in this case constitutes a final rejection of the Secretary's reliance on the Listing as a basis for rejecting respondent's claim—and because the rehearing mandated by the district court will take place before the Secretary, not the court—the Secretary's appeal of the district court's order does not interfere with any on-going pro-

ceedings in the district court or undermine the independence or special role of the district judge. Conversely, a refusal to allow the Secretary to appeal the order invalidating his longstanding regulatory requirement *would* undermine the special role and distinct responsibilities of the Secretary, the Executive Branch officer in whom Congress has vested the primary responsibility for implementing the Social Security Act. Such a refusal also would impose an unwarranted burden on an "already overburdened agency" (*Heckler v. Campbell*, 461 U.S. at 468) because it would require the Secretary to conduct additional proceedings that are both unnecessary and wasteful of scarce resources if (as the Secretary firmly believes) the regulations governing surviving spouses' disability claims are valid. See *Occidental Petroleum Corp. v. SEC*, 873 F.2d 325, 329 (D.C. Cir. 1989); *Stone v. Heckler*, 722 F.2d 464, 467 (9th Cir. 1983).

The governmental and public interests favoring a right to an immediate appeal extend well beyond this particular claim, because the Secretary, claimants generally, and the public would be served by prompt appellate resolution of the validity of longstanding regulations governing the adjudication of thousands of claims annually.<sup>29</sup> The

<sup>29</sup> These regulations have become the subject of numerous challenges in the district courts in recent years, and the Secretary has taken appeals from a number of district court decisions that held the Listing requirement unlawful and remanded the cause to the Secretary. See *Kier v. Secretary of HHS*, No. H-85-830 (JAC) (D. Conn. Feb. 27, 1989), *aff'd*, 888 F.2d 244 (2d Cir. 1989); *Haywood v. Bowen*, No. A-85-CV-296 (W.D. Tex. Feb. 19, 1988), appeal dismissed, No. 88-1280 (5th Cir. Nov. 30, 1988) (862 F.2d 873 (Table)); *Edmond v. HHS*, No. C87-2132 (N.D. Ohio Dec. 20, 1988), appeal pending, No. 89-3161 (6th Cir.) (order finding jurisdiction dated Apr. 19, 1989); *Davidson v. Bowen*, No. CIV-85-0420-C (D.N.M. Jan. 25, 1988), appeal pending, No. 88-1472 (10th Cir.) (order making preliminary determination of jurisdiction dated Oct. 12, 1989).

interests favoring appeal also extend far beyond the Social Security disability program: "operational consistency and predictability" require a "uniform rule" governing the appealability of district court orders holding agency action unlawful and remanding for further proceedings. *Budinich v. Becton Dickinson & Co.*, 486 U.S. at 202. In many areas of regulatory, ratemaking, and other administrative activity, the agency action may involve an important rule or implicate an important policy of broad application in the conduct of private affairs. The uncertainty occasioned by a lower court's invalidation of such a rule or policy would pose special difficulties for an agency if it was forced in all instances to develop new evidence and assess alternative measures under the requirements of the court's remand order, with only the possibility that a second action for review might lead to a definitive ruling from an appellate court on the validity of the agency's original approach.<sup>30</sup> Thus, recognition of an agency's right to appeal an order such as that at issue here will promote, not undermine, the "efficient administration of justice" (*Flanagan v. United States*, 465 U.S. at 264).<sup>31</sup>

b. The Secretary's right of appeal is further illuminated by consideration of the three factors the Court has

<sup>30</sup> Three recent commentaries furnish instructive accounts of the adverse consequences of several rulings by the Federal Circuit dismissing appeals from the Court of International Trade that invalidated decisions of the Department of Commerce and remanded to the Department for further proceedings (*Cabot Corp. v. United States*, 788 F.2d 1539, 1542 (Fed. Cir. 1986); *Badger-Powhatan v. United States*, 808 F.2d 823 (Fed. Cir. 1986)). See Hunter & McInerney, *What Happens When the Court Reverses a Dumping or Countervailing Duty Case? What Should Happen?*, 3 Fla. Int'l L.J. 151 (1988); Layton, *Interlocutory Appeal of Remand Orders by the Court of International Trade Under 28 U.S.C. § 1292(d) (1)*, 3 Fla. Int'l L.J. 167 (1988); Horgan, *The Impact of Interlocutory Judicial Decisions Upon Anti-Dumping and Countervailing Duty Proceedings*, 3 Fla. Int'l L.J. 187 (1988).

<sup>31</sup> We do not perceive any risk that the courts will be flooded with such appeals by the government, any more than they have been to date, in view of the rigorous review required before the Solicitor

identified in applying the collateral order doctrine. First, it is undisputed that the district court has "conclusively determine[d] a disputed question" concerning the validity of the Secretary's regulatory approach to the evaluation of claims for surviving spouse's disability benefits. *Coopers & Lybrand v. Livesay*, 437 U.S. at 468.

As to the second factor, respondent argues that the district court's order is not appealable because the issue it resolves is not "completely separate" from the merits of her claim for benefits. Br. in Opp. 18-19, 20-21 (quoting *Coopers & Lybrand v. Livesay*, 437 U.S. at 468). But respondent disregards the significant legal and practical distinctions, for appealability purposes, between an order remanding a matter to an agency for a new round of administrative proceedings and an order entered in the middle of on-going proceedings in the district court itself. The district court order at issue here removed all matters concerning respondent's claim for benefits from the immediate cognizance of the court and returned them to the jurisdiction of the officer of a coordinate Branch. As this Court has observed (*FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 141 (1940)):

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General authorizes an appeal. See *United States v. Mendoza*, 464 U.S. 154, 160-161 (1984). Statistics maintained by HHS show that appeals were taken by the Secretary in only 65 cases under Titles II and XVI of the Social Security Act in fiscal year 1986, 44 cases in 1987, and a combined total of 60 cases in 1988 and 1989. These cases represented only a small percentage of decisions adverse to the Secretary. In fiscal year 1988, for example, district courts reversed the Secretary's decision in 2255 cases (while affirming in 4700). Social Security Administration, *1989 Annual Report to the Congress*, at 34, Table 1. Reversals of the Secretary's decisions exceeded 2000 in preceding years as well. See *1988 Annual Report to the Congress*, at 23; *1987 Annual Report to Congress*, at 33. SSA's *Annual Reports* do not include statistics on how many cases were actually remanded by district courts in each year. However, the *1989 Annual Report* does state that during fiscal year 1988, SSA processed 5840 cases that previously had been remanded by a district court. *Id.*, Table 1, note 1. We have been informed by HHS that this total includes all types of remands.

A review by a federal court of the action of a lower court is only one phase of a single unified process. \* \* \* The technical rules derived from the interrelationship of judicial tribunals forming a hierarchical system are taken out of their environment when mechanically applied to determine the extent to which Congressional power, exercised through a delegated agency, can be controlled within the limited scope of "judicial power" conferred by Congress under the Constitution.

The second factor in the *Coopers & Lybrand* test, like the first, is designed to prevent an appeal before all related legal and factual issues have been fully developed and resolved at trial; if the legal issue addressed by the district court's order is separate, there is much less chance that subsequent developments at trial will cast new light on the issue or prompt the court to reconsider it. In the instant case, there will be *no* further development of legal or factual issues by the district court, since the further proceedings ordered by that court will be conducted in an administrative forum. Moreover, because any deviation by the Secretary from the legal standard imposed by the district court's remand order would itself be legal error (*Sullivan v. Hudson*, 109 S. Ct. at 2254), the validity of the surviving spouse's disability regulations will not be open for consideration in the administrative proceedings on remand (or, presumably, in any future proceedings in the district court on judicial review of the Secretary's new decision). See *Cohen v. Perales*, 412 F.2d at 48. Thus, the very nature of judicial review of agency action—and of an order remanding a matter to the agency for further proceedings under a different legal standard—ensures that the legal issue resolved by the court's order will be separate from the issues open for resolution on remand to the Secretary. Compare *Mitchell v. Forsyth*, 472 U.S. at 527-528.<sup>32</sup>

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<sup>32</sup> Cf. *Budinich v. Becton Dickinson & Co.*, 486 U.S. at 199: "A question remaining to be decided after an order ending litigation

With respect to the third *Coopers & Lybrand* factor, respondent asserts (Br. in Opp. 28-36) that the Secretary should not be permitted to take an appeal now because appellate consideration of the validity of the surviving spouse's disability regulations might not be entirely foreclosed following the remand, and that the issue is therefore not "effectively unreviewable on appeal from a final judgment." 437 U.S. at 468. There can be no assurance, however, that further judicial proceedings of substance in the district court will follow the remand. It may be, for example, that the factual record before the ALJ and Appeals Council on remand will require them to find respondent disabled and to award her benefits under the legal standards imposed by the district court. Section 405(g) does not afford the Secretary a right to seek judicial review of such a decision in favor of the claimant by an ALJ or the Appeals Council.<sup>33</sup> And if, for this or

on the merits does not prevent finality if its resolution will not alter the order or moot or revise decisions embodied in the order."

<sup>33</sup> In 1959, Harold Packer, the officer of the Department of Health, Education, and Welfare who was responsible for Social Security litigation matters, expressed this view of the statutory scheme in his testimony during the first extensive oversight hearings concerning the Title II disability program:

Mr. METCALF. Is there ever an instance when the Department takes an appeal to the court?

Mr. PACKER. No, there cannot be in a title II case. There cannot be any appeal by the Department because the decision rendered by the Appeals Council is the decision of the Secretary. If the decision is favorable to the claimant, of course, there can be no further action. If it is adverse, it is the claimant who appeals and he becomes the plaintiff in the action and the Secretary is the defendant.

Mr. METCALF. So every appeal which is taken to the court has been an appeal from a denial or adverse decision?

Mr. PACKER. Yes; in the first instance, to the district court. Of course, if the district court decision is adverse to the Government, the Government then has the right to appeal further to the appellate court.

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any other reason, the matter does not return to the district court on the merits at a later date, the Secretary will not have an opportunity to seek review of the district court's ruling in the court of appeals. Indeed, the court of appeals assumed that if respondent is awarded benefits on remand, its construction of 28 U.S.C. 1291 will require the Secretary to forgo *all* opportunity for appellate review of the district court's invalidation of his regulatory requirement in this case. Pet. App. 11a.

The court of appeals nevertheless sought to justify its jurisdictional ruling by observing that "it is not inexorably so" that the district court's ruling will escape appellate review. Pet. App. 9a. Presumably, the court meant that review may be available if respondent's claim is *denied* on remand. That possibility is not only speculative; it is also of little help to the Secretary, because the district court's ruling will have continuing force with respect to respondent's individual claim only if she is *awarded* benefits on remand under the legal standards mandated by the district court. Yet, it is in that very situation that further review would be unavailable to the Secretary. See *Crowder v. Sullivan*, No. 89-2681 (7th Cir. Mar. 5, 1990), slip op. 2. In order for a district court ruling to be effectively reviewable on appeal from a subsequent judgment of the district court within the meaning of the third *Coopers & Lybrand* factor, the party aggrieved must at least be assured that, if the other party prevails, a final judgment will be entered from which the aggrieved party can appeal.

Respondent seeks to avoid this defect in her position by suggesting (Br. in Opp. 28-33) that the Secretary may obtain court of appeals review by filing his new decision on remand with the district court, requesting the court to enter a judgment affirming that decision, and then appealing the judgment that affirms his own decision. This argument is unavailing. In the first place,

*Laws of the House Comm. on Ways & Means, 86th Cong., 1st Sess. 692 (1959).*

nothing in Section 405(g) authorizes the Secretary to seek judicial review (including appellate review) of the decision of his own Appeals Council if the Council determines on remand that the claimant must be awarded benefits under the legal standards imposed by the district court. Cf. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. at 481.<sup>34</sup> As we have explained (see pages 21-23, *supra*), the sixth sentence of Section 405(g) provides for the Secretary to file his amended findings and decision with the court only where the case has been remanded for the limited purposes described in that sentence.<sup>35</sup>

<sup>34</sup> In *Harper v. Bowen*, 854 F.2d 678, 681 (4th Cir. 1988), the court considered it "possible" that the Secretary might be able to obtain appellate review in this manner.

<sup>35</sup> Of course, where the court has remanded the cause to the Secretary for a rehearing because it has found the Secretary's first decision denying benefits to have been unlawful, it is appropriate for the Secretary to file any new decision awarding benefits with the court so that the court can consider whether attorney's fees should be awarded under the EAJA. See *Sullivan v. Hudson*, 109 S. Ct. at 2255.

Respondent also relies (Br. in Opp. 22-23) on the statement in *Hudson* that the "detailed provisions for the transfer of proceedings from the courts to the Secretary and for the filing of the Secretary's subsequent findings with the court suggest a degree of direct interaction between a federal court and an administrative agency alien to traditional review of agency action under the Administrative Procedure Act." 109 S. Ct. at 2254. With all respect, we submit that those provisions of the sixth sentence of Section 405(g), which are limited to interlocutory remands, are neither unusual nor alien to traditional APA review of agency action. See U.S. Dep't of Justice, *Attorney General's Report on the Administrative Procedure Act* 93 (1947) ("many statutes provide that where the reviewing court finds that the taking of new evidence would be warranted, such evidence must be presented to the agency with opportunity to modify its findings"; those provisions "continue in effect" after enactment of the APA). Such provisions appear in the Hobbs Act, 28 U.S.C. 2347(c), and in a number of other statutes. See, e.g., 15 U.S.C. 45(c) (FTC); 15 U.S.C. 77i(a) (SEC); 15 U.S.C. 78y(a)(5) (SEC); 15 U.S.C. 717r (FERC); 15 U.S.C. 1394(b) (NHTSA); 29 U.S.C. 160(e) (NLRB); 29 U.S.C. 660(a) (OSHRC); 45 U.S.C. 355(f) (Railroad Retirement Board). Some of those statutes are

At the very least, nothing in Section 405(g) *requires* the Secretary to pursue the novel and awkward course suggested by respondent, and thereby to accept the burden of a remand in all cases before obtaining appellate review on a dispositive legal issue. To the contrary, the fourth and eighth sentences of Section 405(g) expressly contemplate that the Secretary may take an immediate appeal from a district court order holding the Secretary's decision legally erroneous, even though the court has remanded the cause to the Secretary for a rehearing. Respondent's proposal to postpone all appellate review until the Secretary has rendered a new decision on remand therefore fails to accord the respect due both the Act itself and the official of a coordinate Branch who is charged with its administration.

cited in footnote 14 to the chapter on judicial review in *Social Security Hearings and Appeals*, at 130, 162.

The passage in *Social Security Hearings and Appeals* quoted by the Court in *Hudson*, 109 S. Ct. at 2254, described the version of the sixth sentence that was in effect prior to the 1980 amendments (see note 18, *supra*), and it criticized that version on the ground that it allowed courts more freedom than they had under other judicial review statutes and thereby enmeshed the courts too much in agency affairs. It was largely in response to that criticism that Congress amended the sixth sentence in 1980 to bring it into conformity with similar provisions in other statutes, and thereby to *diminish* the degree of interaction to which the Court referred in *Hudson*. See H.R. Rep. No. 100, *supra*, at 13 (quoting Center for Administrative Justice, note 18, *supra*, at 270) (a provision similar to relevant portion of amended sixth sentence "is contained in nearly all comparable review statutes"). Furthermore, the Committee Reports on the 1939 amendments in which Section 405(g) was enacted make clear that Congress intended to adopt judicial review provisions "similar to those made for the review of decisions of many administrative bodies." See note 14, *supra*. There is, accordingly, no basis for fashioning a special rule of appealability in Social Security cases based on the sixth sentence of Section 405(g).

## CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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## APPENDIX

## STATUTORY PROVISIONS INVOLVED

## 1. 28 U.S.C. 1291 provides:

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

## 2. Section 205(g) of the Social Security Act, as codified at 42 U.S.C. 405(g), provides (bracketed numbers added):

[1] Any individual, after any final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Secretary may allow. [2] Such action shall be brought in the district court of the United States for the judicial district in which the plaintiff resides, or has his principle place of business, or, if he does not reside or have his principal place of business within any such judicial district, in the United States District Court for the District of Columbia. [3] As part of his answer the Secretary shall file a certified copy of the transcript of the record including the evidence upon which the findings and decision complained of are based. [4] The court shall have power to enter, upon the pleadings

(1a)

and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Secretary, with or without remanding the cause for a rehearing. [5] The findings of the Secretary as to any fact, if supported by substantial evidence, shall be conclusive, and where a claim has been denied by the Secretary or a decision is rendered under subsection (b) of this section which is adverse to an individual who was a party to the hearing before the Secretary, because of failure of the claimant or such individual to submit proof in conformity with any regulation prescribed under subsection (a) of this section, the court shall review only the question of conformity with such regulations and the validity of such regulations. [6] The court may, on motion of the Secretary made for good cause shown before he files his answer, remand the case to the Secretary for further action by the Secretary, and it may at any time order additional evidence to be taken before the Secretary, but only upon a showing that there is new evidence which is material and that there is good cause for the failure to incorporate such evidence into the record in a prior proceeding; and the Secretary shall, after the case is remanded, and after hearing such additional evidence if so ordered, modify or affirm his findings of fact, his decision, or both, and shall file with the court by such additional and modified findings of fact and decision, and a transcript of the additional record and testimony upon which his action in modifying or affirming was based. [7] Such additional or modified findings of fact and decision shall be reviewable only to the extent provided for review of the original findings of fact and decision. [8] The judgment of the court shall be final except that it shall be subject to review in the same manner as a judgment in other civil actions. [9] Any action instituted in accordance with this subsection shall survive notwithstanding any change in the person occupying the office of Secretary or any vacancy in such office.

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### **QUESTION PRESENTED**

Does a court of appeals have jurisdiction under 28 U.S.C. § 1291 of an appeal by the Secretary of Health and Human Services of a district court's order remanding for further proceedings a case brought pursuant to 42 U.S.C. § 405(g) ?

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1989

No. 89-504

LOUIS W. SULLIVAN, SECRETARY  
 OF HEALTH AND HUMAN SERVICES,  
 v. *Petitioner,*

MARILYN FINKELSTEIN,  
*Respondent.*

On Writ of Certiorari to the United States  
 Court of Appeals for the Third Circuit

BRIEF FOR RESPONDENT

STATEMENT OF THE CASE

The court of appeals dismissed an appeal to it for lack of appellate jurisdiction because the district court's order remanding the case to the Secretary of Health and Human Services (the "Secretary") was not a final decision as required by 28 U.S.C. § 1291 (1982). For the reasons discussed below, the decision of the court of appeals should be affirmed.

A. Mrs. Finkelstein's Applications for Benefits

Marilyn Finkelstein is a fifty-nine year old widow suffering from heart disease. (Pet. App. 14a).<sup>1</sup> Her husband died on November 27, 1980, fully insured under the Social Security Act, 42 U.S.C. §§ 301 *et seq.* (Stipulation of Facts ¶ 1 (filed 10/1/85); Pet. App. 14a). She filed an application for benefits with the Social Security Administration (the "SSA") on October 19, 1981 and was awarded widow's disability benefits for her heart dis-

<sup>1</sup> "Pet. App." refers to the Secretary's Appendices to his Petition for a Writ of Certiorari. The Secretary's Petition is cited as "Pet."; his Brief on the Merits is cited as "Br."

ease, pursuant to 42 U.S.C. § 423(d)(2)(B) (1982 & Supp. I 1983). (Stipulation of Facts ¶ 2 (filed 10/1/85)). However, when she remarried on December 5, 1982, she became ineligible for benefits, pursuant to the then-effective provision of the Social Security Act disallowing widow's benefits upon remarriage, 42 U.S.C. § 402(e)(1) (1982). (*Id.*).

In 1983, Congress amended the Social Security Act to allow payment of disability benefits to previously entitled widows who remarried after age fifty. Social Security Amendments of 1983, Pub. L. 98-21 § 131(a), 97 Stat. 65, 92 (codified at 42 U.S.C. § 402(e)(3)(A) (Supp. I 1983)). Mrs. Finkelstein again was eligible for benefits, and on November 25, 1983—more than six years ago—she reapplied to the SSA for the disability benefits she previously had been receiving. (Stipulation of Facts ¶¶ 1, 2 (filed 10/1/85)). It is that application that is the subject of this case.

#### B. Widow's Benefits Under the Social Security Act

Under the Social Security Act, a widow may not obtain disability benefits unless she has a physical or mental impairment "of a level of severity which under regulations prescribed by the Secretary is deemed to be sufficient to preclude an individual from engaging in any gainful activity." 42 U.S.C. § 423(d)(2)(B).

The SSA determines that a widow is disabled when her impairment or combination of impairments "has specific clinical findings that are the same as those for any impairment in the Listing of Impairments in Appendix 1 [to Subpart P of 20 C.F.R. Part 404] or medically equivalent to those for any impairment shown there." 20 C.F.R. § 404.1578 (1989). In determining whether a widow is entitled to benefits, the SSA evaluates her disability solely with reference to the Listing of Impairments. It does not make an individualized analysis of the functional consequences of the impairment on the claimant (the impairment's "functional impact"), despite express court of appeals holdings to the contrary.<sup>2</sup>

#### C. The SSA's Rejection of Mrs. Finkelstein's Claim

Mrs. Finkelstein's application for reinstatement of her benefits was denied initially and again upon reconsideration on March 28, 1984. (Pet. App. 14a). On September 28, 1984 (almost three years after Mrs. Finkelstein was initially found sufficiently disabled to receive benefits), an Administrative Law Judge ("ALJ") found, after a hearing, that Mrs. Finkelstein's heart disease did not make her a "disabled widow within the meaning of the Social Security Act." (*Id.*).

The ALJ rejected Mrs. Finkelstein's claim for benefits solely because he found that the evidence did not establish that her clinical findings were "equivalent" to those for ischemic heart disease, one of the cardiovascular impairments listed in the Listing of Impairments. (Pet. App. 16a). The ALJ did not make any findings as to whether Mrs. Finkelstein's impairment is "of a level of severity to prevent a person from doing any gainful activity," the ultimate determination required under 42 U.S.C. § 423(d)(2)(B) and 20 C.F.R. § 404.1577 (1989). (Pet. App. 17a). The ALJ's decision denying benefits to Mrs. Finkelstein became the final decision of the Secretary when the Appeals Council denied Mrs. Finkelstein's request for review on December 11, 1984. (Pet. App. 14a).

#### D. The District Court's Remand of Mrs. Finkelstein's Case

Mrs. Finkelstein sought review of the Secretary's decision in the United States District Court for the District of New Jersey, pursuant to Section 205(g) of the Social Security Act, 42 U.S.C. § 405(g) (1982). (Pet. App. 13a). The district court correctly observed that it is required by Section 405(g) to uphold the ALJ's decision "if after review of the record, there is substantial evi-

<sup>2</sup> *Cassas v. Sec'y of HHS*, 893 F.2d 454, 458-59 (1st Cir. 1990); *Kier v. Sullivan*, 888 F.2d 244, 247 (2d Cir. 1989); see also *Willeford v. Sec'y of HHS*, 824 F.2d 771, 774 (9th Cir. 1987) (Kennedy, J.); *Tolany v. Heckler*, 756 F.2d 268, 271 (2d Cir. 1985); *Marcus v. Bowen*, 696 F. Supp. 364, 379-80 (N.D. Ill. 1988); cf. *Sullivan v. Zebley*, 110 S. Ct. 885, 896-97 (1990) (functional impact must be considered in children's disability cases).

dence supporting the decision.” (*Id.*). The court noted that the ALJ properly “made clear on the record his reasons” for finding that Mrs. Finkelstein did not suffer from an impairment or combination of impairments which was the equivalent of one of the Secretary’s Listed Impairments. (Pet. App. 16a).

However, the record was “devoid of any findings regarding the functional impact” of Mrs. Finkelstein’s heart disease. (Pet. App. 17a). The district court held that “further proceedings” were therefore necessary in order for the SSA “to inquire whether the plaintiff may or may not engage in any gainful activity, as contemplated by the [Social Security] Act.” (Pet. App. 18a).<sup>3</sup> The district court therefore remanded the case “for good cause shown.” (Pet. App. 25a). In doing so, the district court did not “uphold” or “affirm” the Secretary’s decision in any respect.

#### E. The Court of Appeals’ Dismissal for Lack of Appellate Jurisdiction

The SSA did not conduct the further proceedings on remand ordered by the district court so that a final determination of Mrs. Finkelstein’s application (which by then had been pending for more than four years) could be made. Instead, the Secretary attempted to appeal the district court’s remand order, contending that the statute

<sup>3</sup> By disregarding the functional impact of Mrs. Finkelstein’s impairments, the SSA failed to assess whether she suffers from impairments that are just as disabling as a Listed Impairment even though they may not meet the precise requirements of any single Listing. Thus, the SSA did not determine whether her impairments are of the level of severity determined to preclude performance of any gainful activity—which is the statutory test. See cases cited p. 3 n.2, *supra*. As the Court held in *Sullivan v. Zebley*, 110 S. Ct. at 896, in the context of children’s disability benefits, the SSA’s method of determining whether an impairment or combination of impairments “meets or equals” a Listed Impairment is not an accurate measure of severity: “[n]o decision process restricted to comparing claimants’ medical evidence to a fixed, finite set of medical criteria can respond adequately to the infinite variety of medical conditions and combinations thereof . . .”

and applicable regulations require him to look only to whether a claimant’s clinical findings meet or equal those of an impairment listed in the Listing of Impairments without regard to the individual functional impact of the claimant’s impairment or an examination of her “residual functional capacity.” (Pet. App. 2a-3a; 869 F.2d 215, 216-17). See 20 C.F.R. § 404.1545 (1989) (defining residual functional capacity for wage earners, but not functional impact).

The court of appeals dismissed the appeal for lack of appellate jurisdiction. (Pet. App. 19a-20a; 869 F.2d at 220). The court observed that remands to administrative agencies are not ordinarily appealable under 28 U.S.C. § 1291 because a remand order is “typically an interlocutory step in the adjudicative process and, therefore, not a final order.” (Pet. App. 4a; 869 F.2d at 217). The court held that “[t]he particular district [court] order” was “interlocutory, not final,” because the district court “ordered consideration of an additional factor before final administrative adjudication of the benefit issue.” (Pet. App. 12a; 869 F.2d at 220). With respect to the collateral order doctrine of *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 545-47 (1949) (“*Cohen v. Beneficial*”), the court also held inapplicable the “narrow exception to the normal rule of non-appealability . . . limited to cases in which an important legal issue is finally resolved and review of that issue would be foreclosed ‘as a practical matter’ if an immediate appeal were unavailable.” (Pet. App. 4a-5a; 869 F.2d at 217). The court of appeals subsequently denied the Secretary’s petition for rehearing and also denied rehearing *in banc*. (Pet. App. 21a; 869 F.2d at 220-21).

#### SUMMARY OF ARGUMENT

The Secretary seeks to have this Court virtually rewrite Section 405(g) and recast the established law on finality under Section 1291 so that clearly interlocutory district court remands will be termed “final decisions” under Section 1291. The Secretary alternatively suggests that he be given a special application of the *Cohen v.*

*Beneficial* collateral order doctrine that would permit him immediately to appeal a district court remand before completion of a case. The Secretary thus invites this Court to disavow the interpretation of Section 405(g) set forth last Term in *Sullivan v. Hudson*, 109 S. Ct. 2248 (1989), and to stretch beyond recognition the well-contoured narrow exception to the rule of finality under Section 1291. This Court should decline the invitation.

A. The Secretary's proposal would be destructive of the policies underlying the carefully developed law of appellate jurisdiction and would serve no compensating public purpose. It would instead unduly burden the courts of appeals by making piecemeal appellate adjudication of administrative proceedings routine, would work considerable inequity on applicants for Social Security disability benefits, and would likely increase the institutional burdens of the SSA.

B. Moreover, there is no need to accept the Secretary's short-sighted invitation. Underlying his argument is the fallacy that he has no convenient way to obtain appellate consideration of remands involving issues he deems important, within the confines of the current law of appellate jurisdiction. The Secretary is wrong; he has at least five convenient methods. *First*, the Social Security claimant, if dissatisfied after the decision on remand, may return to the district court. The Secretary may then obtain appellate review of the issue that initially prompted the district court to remand. This is precisely what occurred only a few months ago in another widow's disability benefits case, which held that functional impact must be considered. *Kier v. Sullivan*, 888 F.2d at 247. See pp. 37-38, *infra*.

*Second*, the judicial review mechanism set forth in Section 405(g) permits the Secretary, after the proceedings on remand, to return to the district court for entry of a final decision, after which he can take an appeal. The procedure set forth in Section 405(g) provides that after remand the Secretary may file with the district court his new decision granting or refusing benefits, and

can then engage in further substantive proceedings. The statute contemplates such a return, and the courts have required it. In fact, the Secretary has conceded that the district court retains jurisdiction to review any determination rendered on remand (see p. 14, *infra*), and that returning to the district court (even after an award of benefits) is "appropriate" (Br. at 44 n.35). He may then take an appeal from the final decision of the district court, including any issues involved in the original remand order.

*Third*, the sheer number of cases the Secretary litigates assures that he is able to obtain appellate review of issues he deems important after final determinations of claimants' applications by the district courts. Indeed, four circuits have decided or are now considering the precise issue he purported to appeal in this case, and it has been available for review from final decisions by numerous district courts across the country. See pp. 48-49 & n.44, *infra*.

*Fourth*, in the appropriate case, the Secretary may seek discretionary review pursuant to 28 U.S.C. § 1292 (b) (Supp. II 1984), the congressionally endorsed mechanism for immediate review of otherwise unreviewable interlocutory orders; and, *fifth*, in exceptional circumstances, the Secretary may seek a writ of mandamus in the court of appeals.

C. In order to support his request for special application of the finality rules, the Secretary advances "alternative theories" (Pet. at 15, 19) that lack any grounding in legal precedent, policy or logic and are inconsistent with the Secretary's prior interpretations of Section 405(g). The Secretary initially claims that a district court's remand "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Catlin v. United States*, 324 U.S. 229, 233 (1945). This argument, however, misconceives the nature of a final decision because it fails to focus on the remaining steps to be taken before conclusion of the litigation. The Secretary never addresses the fundamental

point that neither he nor Mrs. Finkelstein has yet received a decision by the court whether she is entitled to the benefits she sought by bringing suit.

The Secretary seeks to circumvent the general rule that a district court remand is not a final judgment with a novel interpretation of Section 405(g) that, if accepted, would require analyzing the nature of every remand for purposes of appealability. The Secretary's reading violates the plain language of the statute, as well as congressional intent. The proper reading of Section 405(g) confirms that a district court remand is not a final decision, and that appealability does not depend on an analysis of the nature of each remand. Moreover, the Secretary's theory is precluded by this Court's decision last Term in *Hudson*, in which the Court recognized that a final judgment is not reached until *after* the completion of the proceedings on remand. 109 S. Ct. at 2255. Furthermore, administration of the Secretary's first theory would be impractical, requiring a case-by-case determination in the courts of appeals of the proper categorization of every district court remand to the Secretary (some five to fifteen thousand per year).

D. The Secretary's second "theory"—that the district court's order was an appealable collateral order—fails under the requirements set forth in *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978), and cases following it. As discussed above, the district court's order is not "unreviewable on appeal from a final judgment." *Id.* Moreover, the district court did not resolve "an important issue completely separate from the merits," *id.* (the Secretary has conceded the latter, Pet. at 16 n.9). The district court's decision is not of national importance, particularly because, under the SSA's longstanding policy, district court rulings control only the particular application for benefits and not subsequent cases.

The Secretary's invitation would upset the carefully developed scheme established by Congress for appeals from final decisions as of right under Section 1291 and appeals from interlocutory decisions under the conditions

specified in Section 1292—a balance zealously guarded by this Court in a multitude of contexts.

### ARGUMENT

The final judgment rule has been a statutory prerequisite to appellate review since the First Congress passed the Judiciary Act of 1789, ch. 20 §§ 21, 22, 25, 1 Stat. 73, 83-85. Congress has presently vested the courts of appeals with jurisdiction under 28 U.S.C. § 1291, which provides, in pertinent part, that "courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States," and under 28 U.S.C. § 1292 (1982 & Supp. II 1984), which provides for appellate jurisdiction over interlocutory district court decisions in certain expressly articulated exceptions to the general requirement of finality.

In the years since its watershed opinion in *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978), this Court has steadily confined the ability of a dissatisfied litigant immediately to appeal an interlocutory district court order under Section 1291.<sup>4</sup> Generally, no litigant may appeal

<sup>4</sup> District court orders in all of the following cases have been held not immediately appealable under Section 1291: *Lauro Lines S.R.L. v. Chasser*, 109 S. Ct. 1976, 1980 (1989) (order denying motion to dismiss on basis of contractual forum selection clause); *Midland Asphalt Corp. v. United States*, 109 S. Ct. 1494, 1498 (1989) (order denying motion to dismiss indictment for alleged violation of grand jury secrecy rule); *Van Cauwenberghe v. Biard*, 486 U.S. 517, 529 (1988) (order denying motion to dismiss on ground of *forum non conveniens*; and order denying motion to dismiss on ground that internationally extradited defendant is immune from civil process); *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 290 (1988) (order denying motion to stay or dismiss action pending resolution of state court suit raising same issues) (overruling *Ettelson v. Metropolitan Life Ins. Co.*, 317 U.S. 188 (1942), and *Enelow v. New York Life Ins. Co.*, 293 U.S. 379 (1935)); *Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370, 378 (1987) (order granting permissive intervention, but denying intervention as of right); *Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424, 440-41 (1985) (order disqualifying counsel in a civil action); *Flanagan v. United States*, 465 U.S. 259, 267 (1984) (order disqualifying counsel in a criminal ac-

until the district court has made a decision that "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Van Cauwenberghe v. Biard*, 486 U.S. at 521 (quoting *Catlin v. United States*, 324 U.S. at 233). Since the decision in *Coopers & Lybrand*, this Court has consistently given the final judgment rule a narrow interpretation.<sup>3</sup> Despite the wide variety of hardships claimed by would-be appellants from the denial of immediate review, the Court has steadfastly "permit[ted] departures from the rule of finality in only a limited category of cases falling within the 'collateral order' exception delineated in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 545-47 (1949)." *United States v. Hollywood Motor Car Co.*, 458 U.S. at 265 (emphasis added).<sup>4</sup>

tion); *United States v. Hollywood Motor Car Co.*, 458 U.S. 263, 270 (1982) (order denying motion to dismiss based on prosecutorial vindictiveness); *Firestone Tire & Rubber Co. v. Rixford*, 449 U.S. 368, 377 (1981) (order denying motion to disqualify counsel in a civil action); *Coopers & Lybrand v. Livesay*, 437 U.S. at 469 (order determining that an action may not be maintained as a class action).

<sup>3</sup> We have found only one case since *Coopers & Lybrand* in which the Court has held an arguably non-final order to be final. *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 10 (1983) (order staying federal action pending resolution of state court suit is a final decision where the stay "amounts to a dismissal of the suit").

<sup>4</sup> In the collateral order area, the Court has been especially protective of the integrity of the final judgment rule, preserving the narrow scope of the exception. In contrast to the many cases denying appellate review under the collateral order doctrine (pp. 9-10 n.4, *supra*), in only a handful of cases has the Court found orders that satisfy all of the Court's "collateral order" requirements. *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985) (denial of motion to dismiss by the Attorney General of the United States on grounds of immunity from suit); *Nixon v. Fitzgerald*, 457 U.S. 731, 742-43 (1982) (same by President of the United States); *Richardson v. United States*, 468 U.S. 317, 321 (1984) (denial of criminal defendant's motion to avoid exposure to double jeopardy as guaranteed by the Fifth Amendment to the United States

# **I. THE DISTRICT COURT'S REMAND ORDER WAS NOT A "FINAL DECISION" THAT CONCLUDED THE PROCEEDINGS.**

The Secretary's first "theory"—that the district court's remand order to the Secretary was a "final decision" within the meaning of Section 1291 "in the usual sense of concluding the judicial proceedings" (Pet. at 20)—is contrary to well-settled jurisprudence under Section 1291 and is based on a misinterpretation of Section 405(g).

## **A. The Secretary's Position Is Inconsistent With This Court's Jurisprudence, With Uniform Court of Appeals Decisions, and With the Secretary's Concessions.**

As the court of appeals held, the district court's order in this case was a typical interlocutory remand, requiring the "consideration [by the Secretary] of an additional factor before final administrative adjudication" could take place. (Pet. App. 12a; 869 F.2d at 220). It was merely a step in the process of deciding the claim. The remand clearly does not meet this Court's definition of a final decision under Section 1291: "a decision by the district court that 'ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.'" *Van Cauwenberghe v. Biard*, 486 U.S. at 521-22 (quoting *Catlin v. United States*, 324 U.S. at 233). Put another way, Mrs. Finkelstein has "received none of the relief" she sought by bringing suit. *Liberty Mutual Ins. Co. v. Wetzel*, 424 U.S. 737, 742 (1976). As this Court explained last Term, a Social Security claimant who has won a remand is in a situation "for all intents and purposes identical" to that of a litigant who, having won a reversal of a directed verdict, must still proceed to the conclusion of the litigation. Neither has

Constitution); *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. at 11-12 (alternative holdings under final judgment rule and collateral order doctrine); *Helstoski v. Meanor*, 442 U.S. 500, 508 (1979) (denial of a motion to dismiss by former member of Congress on the ground that the Speech and Debate Clause of the United States Constitution prevents the action from being brought at all).

yet "achieve[d] [any] of the benefit sought in bringing the action." *Sullivan v. Hudson*, 109 S. Ct. at 2255.

The Secretary argues, however, that "the subject matter of the civil action . . . is not the plaintiff's underlying monetary claim for benefits under the Social Security Act, but rather the validity of the Secretary's final decision disposing of that claim." (Br. at 15-16). Under the Secretary's theory, claimants go to court not to obtain disability benefits, but to test—in some academic way—the "validity" of the Secretary's decision. This argument ignores reality: interlocutory rulings are often made on intertwined issues of law and fact; the presence of legal issues does not somehow transform the remand into a final decision. See 109 S. Ct. at 2254.

In examining whether a judgment is "final," the courts look to the proceedings that lie ahead in the litigation for all parties, not at the extent to which a ruling affronts or sets back the case of one of the parties. A litigation has either ended on the merits for all parties, or it has not. This case has not. The content of the judgment the district court will eventually execute after further proceedings have been completed is entirely unknown.<sup>7</sup>

Indeed, for more than twenty years, the Secretary has won dismissals of claimants' appeals of district court remand orders precisely because such orders do not end the litigation on the merits.<sup>8</sup> If the litigation has not ended for a claimant, it cannot have ended for the Secretary. For this reason, the courts of appeals have "uniformly held that, as a general rule, a [district court's] remand order [to any administrative agency] is 'interlocutory' rather than 'final,' and thus may not be appealed imme-

<sup>7</sup> The form of the district court's action confirms its substance. It entered an "Order," not a "Judgment." (Pet. App. 25a).

<sup>8</sup> *Beach v. Bowen*, 788 F.2d 1399, 1401 (8th Cir. 1986); *Farr v. Heckler*, 729 F.2d 1426, 1427 (11th Cir. 1984); *Howell v. Schweiker*, 699 F.2d 524, 526 (11th Cir. 1983); *Gilchrist v. Schweiker*, 645 F.2d 818, 819 n.1 (9th Cir. 1981); *Dalto v. Richardson*, 434 F.2d 1018, 1019 (2d Cir. 1970), cert. denied, 401 U.S. 979 (1971); *Bohms v. Gardner*, 381 F.2d 283, 285 (8th Cir. 1967), cert. denied, 390 U.S. 964 (1968).

diately (unless, of course, it is certified pursuant to § 1292)." *Occidental Petroleum Corp. v. SEC*, 873 F.2d 325, 329 (D.C. Cir. 1989) (collecting cases). This is the law in every circuit that has considered appeals from district court remands to the Secretary under Section 405(g); it is as true for appeals by the Secretary as it is for claimants' appeals.<sup>9</sup>

In one of the leading cases, Justice (then Circuit Judge) Blackmun explained why he agreed with the Secretary's argument that a district court remand pursuant to Section 405(g) is not a final decision under Section 1291:

The district court merely vacated the Secretary's decision and remanded the case for reconsideration and, possibly, the reception of additional evidence. It neither granted nor denied the relief the claimant seeks. The adverse agency decision so vacated may of course be reinstated in due course but it may go the other way. Until the Secretary acts on the remand we have no insight as to what his eventual decision will be.

*Bohms v. Gardner*, 381 F.2d at 285.

The "uniformly held" principle that a remand does not meet the general requirement of finality is so well recognized that only last year the Secretary conceded "that, ordinarily, a remand order is not a final decision

<sup>9</sup> *Colon v. Sec'y of HHS*, 877 F.2d 148, 151 (1st Cir. 1989); *Dalto v. Richardson*, 434 F.2d at 1019; *Finkelstein v. Bowen*, 869 F.2d 215, 217 (3d Cir. 1989) (Pet. App. 4a); *Harper v. Bowen*, 854 F.2d 678, 680 (4th Cir. 1988); *Tooken v. Harris*, No. 79-3340 (5th Cir. March 25, 1980) (reported as an appendix to *Howell v. Schweiker*, 699 F.2d at 527, 527); *Whitehead v. Califano*, 596 F.2d 1315, 1319 (6th Cir. 1979); *Crowder v. Sullivan*, No. 89-2681, slip op. at 1 (7th Cir. March 5, 1990) (to be reported at 897 F.2d 252); *Beach v. Bowen*, 788 F.2d at 1401; *Gilchrist v. Schweiker*, 645 F.2d at 819 n.1; *Doughty v. Bowen*, 839 F.2d 644, 645 (10th Cir. 1988); *Farr v. Heckler*, 729 F.2d at 1427. Although some of these cases found the collateral order exception applicable, we are aware of no case that has ever adopted the Secretary's current theory that a remand is a final order that ends the litigation on the merits.

of the district court, as that term is construed pursuant to 28 U.S.C. § 1291, and thus provides *no basis* for our assertion of jurisdiction." *Colon v. Sec'y of HHS*, 877 F.2d at 151 (emphasis added).<sup>10</sup> The Secretary made a similar concession before this Court last Term:

The Secretary concedes that a remand order from a district court to the agency is *not* a final determination of the civil action and that the district court "retains jurisdiction to review *any* determination rendered on remand."

*Sullivan v. Hudson*, 109 S. Ct. at 2255 (quoting Brief for Petitioner at 16-17) (emphasis added).<sup>11</sup>

<sup>10</sup> The Secretary incorrectly asserts (Br. at 28 & n.21) that "the courts of appeals have, until quite recently, been unanimous in their view that the Secretary may appeal" a remand rejecting his legal conclusion. The courts of appeals have, in fact, repeatedly expressed their view for some time that the Secretary may not appeal a remand order and have dismissed such appeals by the Secretary. See, e.g., *Candill v. Sec'y of HHS*, 877 F.2d 62 (6th Cir. 1989) (Table, No. 89-3464); *Finkelstein v. Bowen*, 869 F.2d at 220 (3d Cir. 1989) (Pet. App. 12a); *Haywood v. Bowen*, 862 F.2d 873 (5th Cir. 1988) (Table, No. 88-1280); *Harper v. Bowen*, 854 F.2d at 680-51 (4th Cir. 1988); *Providence Hosp., Inc. v. Sec'y of HHS*, 798 F.2d 470 (6th Cir. 1986) (Table, No. 86-3325); *Biddle v. Heckler*, 721 F.2d 1321, 1321 (11th Cir. 1983); *Chastang v. Heckler*, 729 F.2d 701, 702 (11th Cir. 1983); *Jordan v. Heckler*, 721 F.2d 349, 349 (11th Cir. 1983); *Tooken v. Harris*, 699 F.2d at 529 (5th Cir. 1980); *Whitehead v. Califano*, 596 F.2d at 1319 (6th Cir. 1979); *Barfield v. Weinberger*, 485 F.2d 696, 698 (5th Cir. 1973). Although the Secretary acknowledges that several courts have dismissed his appeals from remands (Br. at 28-29, n.21), he does not cite *Barfield*, *Tooken*, *Chastang*, *Providence Hospital* or *Candill* at all, and cites *Whitehead* only in his Petition. In support of his position, the Secretary relies on cases allowing appeals under the collateral order exception; those cases cannot withstand scrutiny under *Coopers & Lybrand* and cases following it. See Part II, *infra*.

<sup>11</sup> This Term, the Secretary claims (Br. at 26, n.19) that those concessions were ambiguous and, in any event, were washed away by the new position stated in his Reply Brief in that case. Litigating against the Secretary is like litigating against Proteus, who eluded his captors by changing shape at the last moment. The Secretary has repeatedly advanced inconsistent positions on

Finally, the SSA itself does not consider remands to be "final decisions." Instead, in the SSA's reports to Congress, its tabulation of "final court decisions" *expressly* excludes remands. Nor does the SSA distinguish between "fourth sentence remands" and "sixth sentence remands."<sup>12</sup>

The reasons underlying the final judgment rule fully support its strict application here.

[T]he finality rule of § 1291 protects a variety of interests that contribute to the efficiency of the legal system. Pretrial appeals may cause disruption, delay, and expense for the litigants; they also burden appellate courts by requiring immediate consideration of issues that may become moot or irrelevant by the end of trial. In addition, the final-

numerous issues relating to Section 405(g) including: (1) whether a remand ordered after the merits are reached is a final decision of the action (compare his concessions in *Hudson* above and before the courts of appeals in *Colon v. Sec'y of HHS*, 877 F.2d at 151, and *Brown v. Sec'y of HHS*, 747 F.2d 878, 884 (3d Cir. 1984) (discussed at p. 24, *infra*), with his disavowal of these concessions in this case (Br. at 26 n.19)); (2) whether a claimant may ever appeal a remand order (compare his consistent and successful position of more than 20 years that claimants may *not* appeal remand orders of any kind, *supra* at p. 12 n.8, with his statement in this case that these decisions "may well be" wrong (Br. at 21 n.17)); and (3) whether a legal issue decided in a remand order may be appealed upon final judgment after the remand proceedings (compare the Secretary's own appeal in *Kier v. Sullivan*, 888 F.2d 244 (2d Cir. 1989), discussed *infra* at 37-38, with his attempt to prevent claimants from doing just that in *Hatcher v. Sec'y of HHS*, No. 88-2918, slip op. at 7 (4th Cir. October 6, 1989), and *Copeland v. Bowen*, 861 F.2d 536 (9th Cir. 1988)). In light of the confusion the Secretary has sown, it is no wonder that the courts of appeals have not uniformly interpreted Section 405(g).

<sup>12</sup> SSA, 1989 Annual Report to Congress at 26, 34 Table 1 n.1; see Deputy Comm'r of SSA for Programs, *Fiscal Year 1989 Report on Federal Court Decisions* Table 3 (Nov. 28, 1989) ("Fiscal 1989 Report"); Deputy Comm'r of SSA for Programs, *Fiscal Year 1988 Report on Federal Court Decisions* Table 3 (Nov. 3, 1988) ("Fiscal 1988 Report").

ity doctrine protects the strong interest in allowing trial judges to supervise pretrial and trial procedures without undue interference.

*Stringfellow v. Concerned Neighbors in Action*, 480 U.S. at 380. As we demonstrate below (see Part III, *infra*), the rule the Secretary proposes would exacerbate already intolerable delays caused to claimants, would further clog already overcrowded dockets in the courts of appeals, and would unduly interfere with the role of the district judges—who are “ground-level” participants in the adjudication of Social Security claims, *Sullivan v. Hudson*, 109 S. Ct. at 2254.

#### B. The Secretary Misinterprets Section 405(g).

Because it suits his purpose in this particular case, the Secretary attempts to circumvent the law under Section 1291 with a strained “interpretation” of Section 405(g). In doing so, the Secretary ignores the jurisprudence he has helped to create over the last twenty years, as well as the realities of district court review of SSA decisions.

The Secretary asserts that in this one subsection, 405(g), Congress has authorized the district courts to remand cases in two different ways with two radically differing consequences. He distinguishes between “fourth sentence remands” and “sixth sentence remands,” contending that different rules of appellate jurisdiction apply depending on which sentence is found to govern a particular remand. The Secretary claims that he can appeal a “fourth sentence remand,” while a “sixth sentence remand” is not appealable by either party. (Br. at 23). This argument makes no sense.

First, this interpretation, which was advanced by the Secretary last Term in *Sullivan v. Hudson*, see p. 26 n.21, *infra*, is precluded by that decision. In that case, the Court made no distinction among the sentences in Section 405(g) referring to remands, and instead made it clear that a district court remand to the SSA is not a final decision, 109 S. Ct. at 2254-56. Second, the Secretary’s

argument is based on a misreading of the plain language of Section 405(g) that entirely misconceives the purpose of that provision and violates the general congressional mandate in Sections 1291 and 1292. Third, assuming, *arguendo*, that the Secretary is correct that a “fourth sentence remand” can be identified and is immediately appealable, this order was not such a remand. Finally, adopting the Secretary’s proposal to distinguish among remands on a case-by-case basis would be impractical, generating a flood of litigation.

#### 1. Under *Sullivan v. Hudson*, a Section 405(g) Remand Is Not a Final Decision.

Only last Term, this Court in *Sullivan v. Hudson*, 109 S. Ct. at 2254-56, made it clear that a district court remand to the SSA is not a final decision. In *Hudson*, the Court thoroughly examined when a plaintiff has “prevailed” and when “final judgment” is deemed entered in an action under Section 405(g), because the Equal Access to Justice Act (the “EAJA”) allows a litigant who is a “prevailing party” in a civil action against the federal government to recover fees in certain circumstances if the litigant applies for fees within thirty days of entry of final judgment. 28 U.S.C. § 2412(d)(1) (1982 & Supp. III 1985). The Court held that the SSA proceedings after remand by the district court are so intimately related to securing the relief sought by bringing the civil action that the court may award attorney’s fees under the EAJA to a claimant for representation during those proceedings. 109 S. Ct. at 2257-58. The appropriate time to apply for such fees is *after* the completion of the remand proceedings, not when the remand order is entered. *Id.* at 2255.

Not only did the Court in *Hudson* point out that a remand is not a “final judgment” under the EAJA, the Court squarely held that “the judicial review provisions of the Social Security Act contemplate an ongoing civil action of which the remand proceedings are but a

part . . . ." *Id.* at 2256-57.<sup>13</sup> The broad participation granted to the district courts by Section 405(g) places them "virtually as coparticipants in the process, exercising ground-level discretion of the same order as that exercised by ALJs and the Appeals Council . . . ." *Id.* at 2254 (quoting J. Mashaw, *et al.*, *Social Security Hearings and Appeals* 133 (1978)). The detailed provisions of Section 405(g) contemplate "the transfer of proceedings" back and forth between the courts and the SSA, "suggest[ing] a degree of direct interaction . . . alien to traditional review of agency action under the Administrative Procedure Act." *Id.*<sup>14</sup> Because the district court "retains jurisdiction to review any determination rendered on remand" under Section 405(g), "there will often be no final judgment in a claimant's civil action for judicial review until the administrative proceedings on remand are complete." *Id.* at 2255. Thus, *Hudson* contemplates the Secretary's return to the district court for the entry of a final judgment and subsequent consideration of an EAJA fee application.

Moreover, the Court made no distinction among different kinds of remands. In fact, the remand in that case resulted from the Secretary's failure to consider the cumulative effect of the claimant's impairments—a remand, in the Secretary's present terminology, that would have somehow terminated the litigation because it was based on legal error. Therefore, under *Hudson*, a claimant who has won a remand based on legal error has not won a final decision.

<sup>13</sup> The dissenters had no disagreement with the Court's explanation of the role of the district court and the procedures to be followed in actions brought under Section 405(g). See *id.* at 2261 (White, J., dissenting) ("the remand decision is not a 'final judgment,' nor is the agency decision after remand") (quoting H.R. Rep. No. 120, 99th Cong., 1st Sess. 19, reprinted in 1985 U.S. Code Cong. & Admin. News 132, 148).

<sup>14</sup> Indeed, in 42 U.S.C. § 405(h) (1982), Congress limited review of Social Security cases under the Administrative Procedure Act. See *Califano v. Sanders*, 430 U.S. 99, 106 (1977).

The Secretary's assertion that it is "not the underlying claim for benefits . . . that the claimant has 'complained of'" (Br. at 20) is completely at odds with the Court's findings in *Hudson*. A litigant does not attain a final decision until the district court makes a conclusive determination whether the plaintiff will receive the relief sought by bringing the action. *Liberty Mutual Ins. Co. v. Wetzel*, 424 U.S. at 742. As the *Hudson* Court explained, a Social Security claimant has not prevailed in litigation or obtained a final judgment under Section 405(g) until after "the successful completion of the remand proceedings before the Secretary." *Sullivan v. Hudson*, 109 S. Ct. at 2255. Only then has the claimant achieved *any* of "the benefit sought in bringing the action." *Id.* (citing *Paulson v. Bowen*, 836 F.2d 1249, 1252 (9th Cir. 1988); *Swedberg v. Bowen*, 804 F.2d 432, 434 (8th Cir. 1986); *Brown v. Sec'y of HHS*, 747 F.2d at 880-81).

Despite this precedent, the Secretary, apparently having grown to regret his concession in *Hudson* that a remand is *not* a "final determination of the civil action," see pp. 13-14, *supra*, now asks this Court to reverse course and hold that the district court proceedings are in fact largely distinct from proceedings conducted by the Secretary on remand. (Br. at 20). Although the Secretary attempts to distinguish the holding of *Sullivan v. Hudson* as one that "involved the award of attorney's fees under the Equal Access to Justice Act" (Br. at 25), he offers no explanation for his suggestion that, while a remand under Section 405(g) is not final under the EAJA, it is final under Section 1291. He cannot explain this contradictory assertion because the Court's decision in *Hudson* under the EAJA depended on its analysis of how and when a plaintiff prevails and achieves a final judgment in a case seeking review of a Social Security claim under Section 405(g).<sup>15</sup> Adopting the Secretary's proposal

<sup>15</sup> The Secretary's reliance on *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196 (1988), to distinguish *Hudson* misses the mark. In *Budinich*, the Court held that the mere pendency of an at-

would require a reevaluation of the procedure for the processing of EAJA applications mandated by the Court in *Hudson*.

**2. The Proper Construction of Section 405(g) Confirms That a Remand Is Not a Final Decision.**

The proper reading of Section 405(g) confirms for four reasons that district court remands to the SSA are not final decisions: (a) remands derive from the district courts' equitable powers, and the fourth sentence neither grants authority to remand nor suggests that when a court remands it enters a final judgment; (b) the sixth sentence requires further proceedings in the district court following the Secretary's proceedings after any remand; (c) the eighth sentence provides for the application of ordinary rules of federal appellate jurisdiction, which uniformly hold that a remand order is not a final decision; and (d) the subsequent legislative history confirms this reading of the statute that a remand is not a final decision, and that no distinctions among remands should be made in determining appealability.

a. As this Court recognized last Term in *Hudson*, Section 405(g) made the district courts "ground-level" participants in Social Security claims cases and took them out of "their accustomed role as external overseers of the administrative process." *Sullivan v. Hudson*, 109 S. Ct. at 2254. It was well established at the time of the statute's passage in 1939 that the power to review agency action (expressly granted by the first sentence of Section 405(g)) carried with it equitable powers incident to review, including the power to remand for further administrative action. *Ford Motor Co. v. NLRB*, 305 U.S. 364, 373-75 (1939); *Southern Ry. v. St. Louis Hay &*

*torney's fee* application does not *reopen* an otherwise final judgment, as would, for example, a motion to amend a judgment pursuant to Rule 59 of the Federal Rules of Civil Procedure. In contrast, *Hudson* turned on whether the underlying district court decision to remand was final, so that an EAJA application could be made. The two situations are so different that in *Hudson* neither the majority nor the dissent found any need at all to address *Budinich*.

*Grain Co.*, 214 U.S. 297, 302 (1909); see *Harrison v. PPG Indus.*, 446 U.S. 578, 594 (1980) ("an appellate court may *always* remand a case to the agency for further consideration" (emphasis added)).

In the absence of express statutory expansion of the courts' authority, the actions of the courts were restricted to validating or invalidating the agency decision or remanding for further action:

On the appeal the district court was not authorized to substitute for those of the commission its own views as to what action would be just or ought to be taken, or to perform any legislative, executive, or administrative function. . . .

The permissible scope of the determinations and judgment of the court is significant. It may only decide the questions of law raised by the appeal and affirm or reverse the order or remand the record to the commission for further action. It is without authority to amend or modify an order of the commission.

*Public Service Comm'n v. Havemeyer*, 296 U.S. 506, 517-18 (1936); accord *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 144 (1940) (although the Radio Act of 1927 originally authorized the court of appeals to "alter or revise the decision [of the FCC] appealed from," the Act was amended in 1930 to limit the court's power to "affirming or reversing the decision of the commission," Pub. L. 71-494, 46 Stat. 844, 845); *Central Ky. Natural Gas Co. v. Railroad Comm'n*, 290 U.S. 264, 273 (1933) (court could invalidate commission's rate as confiscatory but had no authority to set rate it considered fair and just).

Only where the legislature had *expressly* expanded the court's reviewing power could a court enter a judgment as if the action had been originally brought and tried in the reviewing court. *E.g.*, *FTC v. Curtis Publishing Co.*, 260 U.S. 568, 580 (1923) ("as the statute grants jurisdiction to make and enter . . . a decree affirming, modifying or setting aside an order, the court . . . has full

power under the statute" to decide the controversy without remanding).<sup>16</sup>

In Section 405(g), Congress accomplished this expansion of power particularly in the fourth sentence, which gave the district court the power—without a *de novo* trial ("upon the pleadings and transcript of the record")—to enter a judgment "affirming, modifying, or reversing" the Secretary's decision, whether or not the district court exercised its equitable power to remand ("with or without remanding").<sup>17</sup> Contrary to the Secretary's unsup-

<sup>16</sup> See 42 Am. Jur. *Public Administrative Law* § 246 at 688 (1936) ("Under the statutes, the power of the courts on review of an administrative determination is usually limited to affirming or setting aside the determination, and it is usually held that they have no power to amend or modify the determination. However, the statutes sometimes vest the court with such power.") (citations omitted); Stason, *Methods of Judicial Relief from Administrative Action*, 24 A.B.A.J. 274, 275-76 (1938) ("Some statutes give the courts the power not only to reverse and affirm, but also to modify, thus conferring power to enter decrees directly disposing of appealed cases. Others limit the court's power to reversal or affirmation."); accord Davis, *To What Extent Should the Decisions of Administrative Bodies Be Reviewable by the Courts?*, 25 A.B.A.J. 770, 772 & n.31, 780 (1939).

<sup>17</sup> As Irving Ladimer, an employee of the Social Security Board involved in the drafting of Section 405(g), explained in an article which appeared shortly after the 1939 amendments to the Social Security Act were passed, "[t]he provisions [for judicial review] are similar to those in other statutes" such as the Federal Trade Commission Act and the National Labor Relations Act. Ladimer, *Hearing and Review of Old-Age and Survivors Insurance Claims and Wage Record Cases by the Social Security Board*, 9 Geo. Wash. L. Rev. 58, 61 & n.12 (1940). These statutes provided a broader grant of reviewing authority than did the statutes providing for review of the ICC and the FCC. *FTC v. Curtis Publishing Co.*, 260 U.S. at 530 ("The language of the [FTC Act] is broad and confers power of review not found in the Interstate Commerce Act . . ."); *FCC v. Pottsville Broadcasting Co.*, 309 U.S. at 144. Although the text of Section 405(g) and contemporaneous interpretation place it squarely in the group of statutes providing broader reviewing authority, it is the narrower statutes on which the Secretary primarily relies for the argument that only the "validity" of the agency's decision is ever at issue on review of

ported assertion that Section 405(g) "limits" the district court's authority (Br. at 16), the statute clearly granted additional reviewing powers without disturbing the already well-developed equitable power to remand for further action. Indeed, in *Califano v. Yamasaki*, 442 U.S. 682, 704-06 (1979), the Court rejected the Secretary's argument that Section 405(g) limits a district court's equitable powers and held that a district court in an action under Section 405(g) has the power to issue injunctions, despite the absence in the statute of an explicit grant of such power.

In this context, it is clear that a district court need not look to Section 405(g) for the authority to remand, and a remand need not, as the Secretary assumes, be "governed by" the fourth sentence or the sixth sentence. Indeed, as discussed above, the fourth sentence was meant to do more than merely define a type of remand, while the sixth sentence describes certain specific procedures applicable to remands. A plain reading confirms that neither sentence presumes to grant afresh the long-established power of reviewing courts to remand agency decisions.

b. The second clause of the sixth sentence sets forth a procedure "after the case is remanded" requiring the Secretary to return to the district court for further proceedings before a conclusive determination of the case is reached. According to the seventh sentence, the district court may then review the Secretary's "modified findings of fact and decision . . . ."

agency action. E.g., *Burlington N. Inc. v. United States*, 459 U.S. 131, 141 (1982) (construing the limited grant of jurisdiction to the court of appeals in 28 U.S.C. § 2349(a) (1982) to review ICC orders and make "a judgment determining the validity of, and enjoining . . . the order of the agency"); *FCC v. National Citizens Comm. for Broadcasting*, 436 U.S. 775, 793 (1978); *Scripps-Howard Radio, Inc. v. FCC*, 316 U.S. 4, 10 (1942); *FCC v. Pottsville Broadcasting Co.*, 309 U.S. at 145; *ICC v. Clyde S.S. Co.*, 181 U.S. 29, 32-33 (1901). Moreover, none of these cases involved any issue of appealability or finality.

Clearly, the remand itself is not a final decision: it was intended that after any remand the Secretary would render another decision and would then return to the district court.<sup>18</sup> Indeed, in *Brown v. Sec'y of HHS*, 747 F.2d at 884, the court of appeals expressly deferred to the Secretary's interpretation of this clause, agreeing that the Secretary must "return to the district court and file a copy of the government's decision upon conclusion of *any* remand proceeding in which a claimant receives benefits" (emphasis in original). In fact, the Secretary concedes here that, even where the court has remanded "because it has found the Secretary's first decision denying benefits to have been unlawful, it is appropriate for the Secretary to file *any* new decision awarding benefits with the court . . . ." (Br. at 44 n.35 (emphasis added)). Such a filing can only be "appropriate" under statutory authority of the sixth and seventh sentences.<sup>19</sup>

<sup>18</sup> The 1939 House and Senate Reports describe the remand mechanism of Section 405(g) by using the terms of the sixth sentence: "Provision is made for remanding of proceedings to the Board for further action, or for additional evidence." S. Rep. No. 734, 76th Cong., 1st Sess. 52 (1939); H.R. Rep. No. 728, 76th Cong., 1st Sess. 43 (1939) (emphasis added).

<sup>19</sup> *Accord Guthrie v. Schweiker*, 718 F.2d 104, 106 (4th Cir. 1983); see also *Wilson v. Heckler*, 609 F. Supp. 120, 120 (W.D. Mo. 1985) ("The Secretary takes this language [in the second clause of the sixth sentence of Section 405(g)] to require her, in any remanded case, to file a supplemental transcript and obtain judicial review of her post-remand decision" (emphasis added)); Final Rule of the SSA Concerning ALJ Decisions on Remand, 54 Fed. Reg. 37,789, 37,791 (1989) ("Because courts in most instances retain jurisdiction of civil actions when they remand them to the Secretary, we cannot bar a person's right to return to that court.").

The Secretary observes (Br. 44-45 n.35) that the sixth sentence is similar to remand provisions in certain other statutes providing for judicial review of administrative decisions. However, he does not cite a single case under any of those statutes distinguishing among remands in the manner he suggests. Thus, any similarity Section 405(g) may have to other statutes undercuts, rather than supports, the Secretary's effort to distinguish "fourth sentence remands" from "sixth sentence remands."

c. The eighth sentence provides that "[t]he judgment of the [district] court shall be final *except that it shall be subject to review in the same manner as a judgment in other civil actions*" (emphasis added). In this sentence, Congress expressed its understanding that appeals from district court decisions under Section 405(g) would be treated like any other appeals. The phrase "the judgment of the court shall be final" does not, as the Secretary suggests (Br. at 18), dictate that "fourth sentence remands" must be appealable. The phrase simply assured that "a judgment rendered [by the reviewing court] will be a final and indisputable basis of action as between the [agency] and the defendant." *FPC v. Pacific Power & Light Co.*, 307 U.S. 156, 160 (1939) (quoting *ICC v. Baird*, 194 U.S. 25, 38 (1904)); see 2 Am. Jur. 2d *Administrative Law* § 768 (1962) ("Finality of Court Decision"). It was not always clear that simple agency action was "final" between the agency and the defendant. *Chicago R.I. & Pac. Ry. v. Schendel*, 270 U.S. 611, 622-23 (1926) (leaving open the question whether agency action can itself serve as *res judicata*); see generally Note, *Res Judicata in Administrative Law*, 49 Yale L.J. 1250 (1940) (exploring the conclusiveness of administrative determinations). This phrase in the eighth sentence therefore codified the principle, later articulated by this Court, that a court's decision reviewing agency action will operate as law of the case and *res judicata*. *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 335-40 (1958). The plain language of the rest of the sentence suggests that, in determining *appealability* of district court orders under Section 405(g), the appellate courts should look to the appropriate jurisprudence under Sections 1291 and 1292.<sup>20</sup>

The Secretary argues that because the fourth sentence empowers the district court to enter a judgment "with

<sup>20</sup> Clearly, the eighth sentence dictates "when" review becomes available; the possibility that it might also accommodate different courts "where" review might be had (Br. at 19-20) is of no moment.

or without remanding," any remand must be a final judgment, and thus a final decision for purposes of Section 1291. (Br. at 17-18). This violates simple logic. The fact that the district court may enter a judgment under the fourth sentence that is or includes a remand does not mean that every remand must be a judgment, especially given the courts' equitable and statutory power to remand aside from the fourth sentence and without entering a judgment.<sup>21</sup>

d. Any ambiguity the Court might find in the statute may be resolved by subsequent legislative history. See *Seatrail Shipbuilding Corp. v. Shell Oil Co.*, 444 U.S. 572, 596 (1980). In 1978, the House Subcommittee on Social Security explained in a comprehensive review of the Social Security Act that no remand under Section 405(g) results in a final decision until the Secretary returns to the district court:

The district court shall remand a case to the Secretary if he so requests before he files an answer, or the court can on its own motion remand the case to the Secretary. The Secretary can modify or affirm a remanded decision, and file with the court any modified findings of fact and decision. The judgment of the court *shall then be final*, except that it shall be subject to review in the same manner as other

<sup>21</sup> Examples of remands that accompany a judgment include those for the calculation of benefits or for certification for payment pursuant to 42 U.S.C. § 405(i) (1982).

Last Term in his Reply Brief on the merits in *Hudson* (at pp. 14-16), the Secretary advanced the same construction of the fourth, sixth and eighth sentences that he does here. The Court did not adopt it. There is no special language in the statute requiring the Court to consider a remand a "final judgment," let alone a final decision under Section 1291. If there were, the Court would have held remands to trigger immediately the thirty-day EAJA clock, and the continued proceedings in the SSA would have been held to be unrelated to the district court action. Moreover, not everything called a "judgment" is a final decision under Section 1291. A grant of partial summary judgment entered pursuant to Rule 56(d) of the Federal Rules of Civil Procedure, for instance, is not an appealable final decision. Fed. R. Civ. P. 54(b).

civil actions, i.e. circuit court of appeals and Supreme Court.

Subcomm. on Social Security of the House Comm. on Ways & Means, WMCP No. 72, 95th Cong., 2d Sess., *The Social Security Amendments of 1977: Brief Summary of Major Provisions and Detailed Comparison With Prior Law* 26-27 (Comm. Print 1978) (emphasis added).

The Subcommittee on Social Security thus made no distinctions between "fourth sentence remands" and other remands. The 1980 amendment to Section 405(g) did not change this. In 1985, the House Judiciary Committee explained the application of the finality requirement in the EAJA to Section 405(g) cases in a similar manner:

[A]fter the HHS review upon remand the agency *must* file its findings with the reviewing court. *Thus the remand decision is not a "final judgment,"* nor is the agency decision after remand. Instead, the district court should enter an order affirming, modifying, or reversing the final HHS decision, and this will usually be the final judgment that starts [the EAJA's] 30 days running.

H.R. Rep. No. 120, 99th Cong., 1st Sess. 19, *reprinted in* 1985 U.S. Code Cong. & Admin. News 132, 148 (emphasis added). These subsequent interpretations by Congress leave no doubt that a remand under Section 405(g) is not a final decision for purposes of appeal to the court of appeals.

In fact, adopting the Secretary's proposal to create an exception to Section 1291 by "interpreting" Section 405(g) would undermine clear congressional intent. If Congress had intended to distinguish between "fourth sentence remands" and "sixth sentence remands," making the former appealable, it could easily have done so. Although it did not do so here, Congress has explicitly provided for court of appeals jurisdiction over certain kinds of interlocutory district court orders in a number of statutes besides Section 1291.<sup>22</sup>

<sup>22</sup> *E.g.*, 28 U.S.C. § 1292 (appeal from certain interlocutory district court orders); 18 U.S.C. § 2518(10)(b) (1988) (appeals

The exceptions to finality afforded by Sections 1291 and 1292 are carefully crafted, and, as this Court has observed, Congress "has in those sections made ample provision for appeal of orders which are not 'final' so as to alleviate any possible hardship." *Liberty Mutual Ins. Co. v. Wetzel*, 424 U.S. at 746. To interpret Section 405(g) as allowing interlocutory appeals in the face of Sections 1291 and 1292 would frustrate Congress' attempt to provide litigants only a limited ability to take interlocutory appeals. *Coopers & Lybrand v. Livesay*, 437 U.S. at 474.

**3. Even if the Sentences of Section 405(g) May Be Read Separately, the District Court's Order Was a Remand Under the Sixth Sentence.**

If the Secretary were correct—and he is not—that a remand must be categorized under either the fourth or sixth sentence of Section 405(g), the remand in this case was made pursuant to the sixth sentence. Even the Secretary would say that such a remand is not an appealable final decision.

The sixth sentence *by its terms* applies to the district court's remand in this case.<sup>23</sup> Indeed, the district court expressly remanded "for good cause shown" (Pet. App. 25a), a requirement that appears only in the sixth sentence. In remanding, the district court held that the Secretary must determine whether respondent has the ability to engage in "any gainful activity." Evidence bearing on that issue was not considered by the ALJ; thus, in sixth sentence terms, there was "new evidence" that had become "material." There was also "good cause for the failure to incorporate such evidence into the record" because such evidence was not considered relevant in the

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by the United States from suppression orders in criminal cases); 18 U.S.C. § 3145(c) (1988) (appeals of bail determinations); Classified Information Procedures Act, 18 U.S.C. App. § 7 (1988).

<sup>23</sup> Nothing in the language of the sixth sentence supports the Secretary's limitation of its scope to "pure remand orders" (Br. at 23) (a term with which we are not familiar).

prior proceedings. The remand here was in accordance, for example, with *Bohms v. Gardner*, 381 F.2d at 286, where the court listed a number of reasons why the district court had "good cause" to remand, including that "an improper standard may have been applied by the hearing examiner . . . ."

The Secretary points to the 1980 amendment to the sixth sentence (Br. at 24-25 n.18), which addressed the Secretary's concern about situations where a claimant failed to present convincing medical evidence of disability to the ALJ but brought such evidence to the district court and moved for a remand. H.R. Rep. No. 100, 96th Cong., 2d Sess. 58, reprinted in 1980 U.S. Code Cong. & Admin. News 1277, 1336; see *Aubeuf v. Schweiker*, 649 F.2d 107, 115-16 & nn.16-18 (2d Cir. 1981). One need not conclude, as the Secretary does (Br. at 22), that the sentence as a whole only applies to "premerits" remands, simply because the sixth sentence was amended in part to address concerns raised by that particular type of remand. The House Report was very clear that the amendment did not alter "the provision of present law that gives the court discretionary authority to remand cases to the Secretary." 1980 U.S. Code Cong. & Admin. News at 1337. In fact, even after reaching the merits, courts continue to remand Social Security cases for the consideration of an additional factor under authority of the "good cause"/"new evidence" language in Section 405(g).<sup>24</sup>

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<sup>24</sup> E.g., *Carter v. Heckler*, 712 F.2d 137, 141 (5th Cir. 1983); *Aubeuf v. Schweiker*, 649 F.2d at 116; *Curtis v. Heckler*, 579 F. Supp. 1026, 1028-29 (E.D. Tex. 1984); see also *Reynolds v. Heckler*, 570 F. Supp. 1064, 1067 (D. Ariz. 1983) ("Good cause may be established . . . when it is shown the Secretary applied improper standards in reaching his decision . . . ."); D. Sweeney, J. Lyko & P. Martin, *Practice Manual for Social Security Claims* 148-49 (1980 & Supp. 1983) (remands for "good cause" are frequently made "when the court finds that significant issues were not considered" and "when the claim was decided under an improper legal standard").

**4. The Secretary's Proposal to Distinguish The Appealability of "Fourth Sentence Remands" From "Sixth Sentence Remands" Is Unsound in Terms of Administration of the Courts of Appeals.**

The Secretary's proposal not only is completely inconsistent with *Hudson* and with the purposes of Section 405(g) and Section 1291, but also would generate unwarranted litigation and confusion in the lower courts. A rule requiring the courts to attempt to distinguish between "fourth sentence remands" and "sixth sentence remands" would result in a case-by-case inquiry of appealability as of right contrary to this Court's teachings that such inquiries are to be avoided. See *Osterneck v. Ernst & Whinney*, 109 S. Ct. 987, 992 & n.3 (1989); *Budinich v. Becton Dickinson & Co.*, 486 U.S. at 202.

Rather than providing "operational consistency," *id.*, the Secretary's rule would generate a flood of litigation about whether each remand was a "fourth sentence remand" and thus immediately appealable under Section 1291, or a "sixth sentence remand" and not immediately reviewable.<sup>25</sup> Indeed, under the Secretary's proposal both the claimant and the Secretary would often be compelled to appeal immediately at the time of any remand, for fear that failure to take an immediate appeal where permitted might waive the right to have review of the is-

<sup>25</sup> Since 1984, remands have comprised between 43% and 63% of district court dispositions of the roughly 8,000 to 28,000 Social Security cases filed each year:

| Fiscal Year | Dispositions | Remands<br>(% of Dispositions) |       |
|-------------|--------------|--------------------------------|-------|
| 1984        | 19,475       | 11,993                         | (61%) |
| 1985        | 27,858       | 17,711                         | (63%) |
| 1986        | 21,259       | 12,602                         | (59%) |
| 1987        | 11,124       | 4,739                          | (43%) |
| 1988        | 14,785       | 7,139                          | (49%) |
| 1989        | 12,005       | 5,389                          | (45%) |

See Div. of App. Assessment of the Off. of Policy & Procedures, SSA Off. of Hearings & Apps., *Court Remands: Analysis and Recommendations* 4 (Dec. 1987); *Fiscal 1989 Report Table 3*; *Fiscal 1988 Report Table 3*.

sues decided. 28 U.S.C. § 2107 (1982); *Dickinson v. Petroleum Conversion Corp.*, 338 U.S. 507, 516 (1950) (appellant's "attempt to review the earlier decree by appealing from the later one is ineffective, and its appeal should be dismissed"); see *Copeland v. Bowen*, 861 F.2d at 538-39 ("[t]he Secretary argues that this appeal is untimely" because the remand order was immediately appealable).<sup>26</sup> Remands would thus be appealed, and their appealability litigated, whenever there was any basis for a difference of opinion as to the type of remand.<sup>27</sup> Moreover, treating remands as final for purposes of appealability would create a peculiar conflict with the timing of EAJA applications, which under *Hudson* are deferred until after the conclusion of the proceedings on remand—an anomaly bound to result in confusion for claimants and the district courts as well.

<sup>26</sup> If the Secretary were correct that a remand is immediately appealable, his time to appeal the district court remand in *Kier v. Sullivan*, 888 F.2d at 245-46, would have lapsed during the course of the administrative proceedings on remand.

<sup>27</sup> This case is illustrative: the parties strongly disagree over the proper characterization of the remand; indeed, the Secretary himself does not quite know how to characterize a district court remand, such as the one in this case (Pet. App. 17a-18a), "to make explicit findings." (See Br. at 25 n.18). In light of this uncertainty, the Secretary's statement that he does not "perceive any risk" of many appeals (Br. at 39-40 n.31; see also Br. at 21 n.17), provides no reliable prediction of what will occur if he is permitted to appeal remand orders, particularly given the likelihood of expanded litigation over types of remands. Moreover, the Secretary's unusual assertion that claimants will not appeal, because they will prefer to rely on the extremely high rate at which the SSA reverses itself on remand, ignores the thousands of appeals that would have to be taken by claimants and the government *simply to preserve their rights*. It also turns the protection of sound administration of the judicial system into a matter of grace from the Department of Justice by its refusing to appeal.

**II. AS THE COURT OF APPEALS HELD, THIS CASE DOES NOT WARRANT APPLICATION OF THE "NARROW EXCEPTION" TO THE FINAL JUDGMENT RULE FOR COLLATERAL ORDERS.**

In *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. at 546, this Court carved out a limited exception to the final judgment rule for a "small class [of cases] which finally determine claims of right separable from, and collateral to, rights asserted in the action . . . ." In order that the exception remain a narrow one, this Court has repeatedly held that "[t]o be appealable as a final collateral order, the challenged order must constitute 'a complete, formal and, in the trial court, final rejection,' *Abney v. United States*, 431 U.S. 651, 659 (1977), of a claimed right 'where denial of immediate review would render impossible any review whatsoever,' *United States v. Ryan*, 402 U.S. 530, 533 (1971)." *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. at 376. This Court has thus held that "to come within the collateral order doctrine of *Cohen*, the order must satisfy each of three conditions: it must (1) 'conclusively determine the disputed question,' (2) 'resolve an important issue completely separate from the merits of the action,' and (3) 'be effectively unreviewable on appeal from a final judgment.'" *Van Cauwenberghe v. Biard*, 486 U.S. at 522 (quoting *Coopers & Lybrand v. Livesay*, 437 U.S. at 468).

These prerequisites to appellate jurisdiction are not, as the Secretary asserts (Br. at 37), mere "factors" or "indicia" to be considered in each case. The Court soundly rejected such an approach in *Coopers & Lybrand*, 437 U.S. at 477 n.30. In fact, the fallacy of the Secretary's position is demonstrated by his reliance on *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. at 10-12, in support of his mistaken belief that something less than satisfaction of the three specific requirements of the collateral order doctrine can sustain an immediate interlocutory appeal under Section 1291. (Br. at 31-32). In that case, the Court first held that the general requirement of finality had been met:

the district court's stay order "amounts to a dismissal of the suit" since "the sole purpose and effect of the stay are precisely to surrender jurisdiction of a federal suit to a state court." 460 U.S. at 10 & n.11. The Court also found the collateral order doctrine applicable. The Court explicitly stated that all three *Coopers & Lybrand* prerequisites are "required to show finality under this exception" and expressly held that all three requirements had been met. *Id.* at 11-13 (emphasis added). See also *United States v. Hollywood Motor Car Co.*, 458 U.S. at 265 (discussed at p. 10, *supra*).

The *Coopers & Lybrand* requirements are fully applicable in the context of judicial review of administrative agency action. See, e.g., *FTC v. Standard Oil Co. of California*, 449 U.S. 232, 246 (1980) (holding that an interlocutory action of the FTC could not be appealed because it was not a final decision or an appealable collateral order); *Occidental Petroleum Corp. v. SEC*, 873 F.2d at 328-32. Indeed, the decision in *Seatrains Shipbuilding Corp. v. Shell Oil Co.*, 444 U.S. at 597-84, another agency case, supports the conclusion that a district court remand to an administrative agency is not an appealable collateral order—or a final decision under the Secretary's first theory. In that case, the district court decided certain claims, remanded other claims to the Secretary of Commerce, and directed the entry of judgment on its decision as a "final judgment" under Rule 54(b) of the Federal Rules of Civil Procedure. This Court held that the district court's final judgment on the non-remanded claims was immediately appealable pursuant to Rule 54(b). As the Court explained, "Rule 54(b) may properly be applied *only* to actions in which there has been a final decision on one or more *but fewer than all* multiple claims raised. This condition is *fully* satisfied here . . . ." *Id.* at 583 n.21 (emphasis added). Clearly, the decision on the remanded claims was not considered final.<sup>28</sup>

<sup>28</sup> The Secretary's reliance (Br. at 29-30) on *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519 (1978), and *ICC v.*

The Secretary seeks to avoid the application of the final judgment rule based on his characterization of the right he seeks to protect as the right to avoid a remand in every administrative proceeding, simply because a

*Brotherhood of Locomotive Eng'rs*, 482 U.S. 270 (1987), for the proposition that the Hobbs Act provides an apt analogy is misguided. Those cases shed no light on the appellate scheme set forth in Sections 1291 and 1292; nor, in those cases, did the Court discuss whether its own jurisdiction was founded on the specific jurisdictional grant in the Hobbs Act in 28 U.S.C. § 2350 (1982), or on the general grant of certiorari jurisdiction in 28 U.S.C. § 1254(1) (1982), or on both. Section 2350 provides that a "final judgment of the court of appeals in a proceeding to review under this chapter [is] subject to review by the Supreme Court on a writ of certiorari as provided by Section 1254(1) . . ." (emphasis added). Section 1254(1), of course, permits review of court of appeals cases in this Court "before or after rendition of judgment."

Moreover, the Secretary's attempt (Br. at 30, 32 n.26) to analogize court of appeals jurisdiction under Section 1291 ("final decisions") to several of this Court's jurisdictional statutes ("final judgments") (28 U.S.C. § 2350 (Hobbs Act); 28 U.S.C. § 1257 (1982); and 15 U.S.C. § 29 (1988) (Expediting Act; see *Brown Shoe Co. v. United States*, 370 U.S. 294, 304-11 (1962)) is unavailing for reasons succinctly pointed out by Professor David L. Shapiro in his chapter on appellate jurisdiction in P. Bator, D. Meltzer, P. Mishkin & D. Shapiro, *Hart & Wechsler's The Federal Courts & the Federal System* (3d ed., 1988) xxiii, 1794-1978 ("Hart & Wechsler"); see also 15 C. Wright, et al., *Federal Practice & Procedure*, § 3908 (1976 & Supp. 1990). The Secretary's assertion that the words "final decision" encompass more than the words "final judgment" has been recognized by the Court as erroneous for over one hundred years. *In re Tiffany*, 252 U.S. 32, 36 (1920); *Crawford v. Haller*, 111 U.S. 796, 797 (1884) ("The use of the term 'final decisions' . . . does not enlarge the scope of the jurisdiction of this Court. It is only a substitute for the words 'final judgments and decrees' . . . and means the same thing."). Professor Shapiro, in fact, has suggested various bases for interpreting "decision" in Section 1291 more narrowly than "judgment" in Section 1257, *Hart & Wechsler* at 1812, including the availability of review of interlocutory orders under statutory authority of Section 1292. Professor Shapiro highlighted "[t]he relative difficulties for a court in administering a flexible standard governing its own appellate jurisdiction

remand compels affirmative conduct by an officer of the executive branch. He argues that "[d]ue respect for a coordinate Branch" requires the immediate right of appellate review because the district court has "'directed' the Secretary to conduct further proceedings . . ." (Br. at 33 & n.27). He offers no reason why "due respect" requires an interlocutory round of judicial proceedings. His suggestion is refuted by the Court's finding in *Hudson* that Section 405(g) contemplates an unusual "degree of direct interaction" between the district courts and the SSA, in which the district courts are "'coparticipants in the [administrative] process, exercising ground-level discretion . . .'" 109 S. Ct. at 2254; see pp. 17-28, *supra*. Moreover, the Secretary's theory is undercut by his concessions that certain remands for the conduct of further proceedings under Section 405(g) are not immediately appealable. (Br. at 15, 23). In those situations, the Secretary agrees that he must abide by the district court's order and is not aggrieved by conducting further proceedings before taking an appeal. There is thus no theoretical basis for treating other, unspecified remand orders as raising special concerns requiring immediate resort to the courts of appeals.<sup>29</sup>

(§ 1257), and in supervising the administration of a standard governing the appellate jurisdiction of thirteen lower courts (§ 1291)." *Id.* While this Court has nearly complete discretion to control its own docket, the courts of appeals—which are subject to mandatory jurisdiction under Section 1291 ("all final decisions")—continue to be, as Justice Scalia has observed, "sorely in need of further limiting principles . . ." *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. at 292 (concurring opinion).

<sup>29</sup> The Secretary alternatively makes the rather unusual assertion that the court of appeals had jurisdiction pursuant to 28 U.S.C. § 1292(a)(1) (1982) because the remand order "had the effect of an injunction." (Br. at 33-34 n.27). That novel theory was not timely pressed in or considered by the court of appeals, and this Court should not, therefore, reach the issue. See *Sullivan v. Everhart*, 110 S. Ct. 960, 967-68 (1990).

The argument also may be rejected out of hand for seven reasons. First, neither the district court nor the parties treated the order as an injunction. See 16 C. Wright, et al., *Federal*

In this case, none of the *Coopers & Lybrand* requirements is met: the district court's remand order is reviewable after the remand hearing; and the order did not conclusively resolve "an important issue completely separate from the merits . . . ." 437 U.S. at 468.

**A. The District Court's Remand Order Is Not "Effectively Unreviewable."**

The Secretary already has numerous avenues of review of a district court remand order. The district court's order in this case may be reviewed whether or

*Practice & Procedure* § 3922 at 24 (Supp. 1990). Second, the district court's remand order in this case did not, as required under Section 1292(a)(1), "give or aid in giving some or all of the substantive relief sought by [the] complaint . . . ." *International Prods. Corp. v. Koons*, 325 F.2d 403, 406 (2d Cir. 1963) (Friendly, J.); accord *Switzerland Cheese Ass'n v. E. Horne's Market, Inc.*, 385 U.S. 23, 25 (1966); *Sullivan v. Hudson*, 109 S. Ct. at 2255 (Social Security claimant who has won remand has not "achieve[d] [any] of the benefit sought in bringing the action"); see 16 C. Wright, et al., *Federal Practice & Procedure* § 3922 at 24 (Supp. 1990) ("Appeal should not be available merely because [a government] official has been directed to consider further a potential action."). Third, the Secretary mistakenly relies on a single case, *Avery v. Sec'y of HHS*, 762 F.2d 158, 160-61 (1st Cir. 1985), which expressly declined even to consider whether a remand order was an injunction. Fourth, the mere fact that the order requires some affirmative action does not make it an injunction. *United States v. Ryan*, 402 U.S. at 534. Fifth, the notion that the district court "ordered further proceedings in a different forum" (Br. at 34 n.27) blithely ignores the holding of this Court in *Sullivan v. Hudson*, 109 S. Ct. at 2254-55. See pp. 17-20, *supra*. Sixth, if a routine remand were an injunction, this Court would not have needed to decide in *Califano v. Yamasaki*, 442 U.S. at 705-06, that a district court has the power to issue injunctions in a Section 405(g) action. Finally, the Secretary does not even attempt to meet his burden of establishing the additional requirements necessary for immediate appellate review of orders having the "practical effect" of an injunction: "that the order will have a 'serious, perhaps irreparable, consequence,' and that the order can be 'effectively challenged' only by an immediate appeal." *Stringfellow v. Concerned Neighbors in Action*, 480 U.S. at 379 (citations omitted); see *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. at 287-88.

not the Secretary, after taking further evidence, grants Mrs. Finkelstein the benefits she seeks. As the Court explained in two opinions last Term, "an order is 'effectively unreviewable' only 'where the order at issue involves "an asserted right the legal and practical value of which would be destroyed if it were not vindicated before trial."'" *Lauro Lines S.R.L. v. Chasser*, 109 S. Ct. at 1978 (emphasis added) (quoting *Midland Asphalt Corp. v. United States*, 109 S. Ct. at 1498, quoting, in turn, *United States v. MacDonald*, 435 U.S. 850, 860 (1978)).

**1. The Secretary's Right to Appellate Review Is Not "Irretrievably Lost," Because the Claimant May Return to the District Court.**

The Secretary argues that he "may not have an effective opportunity for appellate review" (Pet. at 16) because "[t]here can be no assurance" of appellate review. (Br. at 42) (emphasis added). The Secretary has the test backward. As this Court has held,

the final judgment rule requires that except in certain narrow circumstances in which the right would be "irretrievably lost" absent an immediate appeal, *Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424, 431 (1985), litigants must abide by the district court's judgments, and suffer the concomitant burden of a trial, until the end of proceedings before gaining appellate review.

*Van Cauwenberghe v. Biard*, 486 U.S. at 524 (emphasis added). The Secretary does not dispute the conclusion of the court of appeals that "'it is not inexorably so' that consideration of this issue will escape review." (Pet. App. 9a; 869 F.2d at 219). It is certainly possible that respondent will be dissatisfied with the Secretary's decision on remand and return to the district court. Following the district court's final decision, the Secretary would then have the opportunity to appeal all issues in the case, including those from the remand decision.

This is precisely what occurred in the Second Circuit in a recent widow's disability benefits case, *Kier v. Sullivan*, 888 F.2d at 245-46. After the Secretary denied

benefits, the claimant filed suit in the district court under Section 405(g). The district court reversed and remanded the case to the Secretary, holding that the ALJ's conclusion was not supported by substantial evidence and that the Secretary must consider the functional impact of the claimant's impairment. The Secretary did not attempt to appeal that decision, but conducted the proceedings on remand. In those proceedings, the Secretary again denied benefits. The claimant again sought judicial review, and the district court reversed, holding that the claimant had no ability to "perform gainful activity." *Id.* at 246.

Only then did the Secretary appeal the district court's initial holding that the SSA must consider the functional impact of a widow's impairment. Although the court of appeals affirmed that initial holding, the Secretary was able to challenge the district court's initial remand order on appeal from the final judgment.

## **2. The Secretary May Return to the District Court Following His Decision on Remand.**

In addition, the Secretary is in fact *assured* of appellate review: he may return to the district court after making his decision on remand whether he modifies or affirms his decision regarding the respondent's capacity to engage in any gainful activity. As discussed above—and in *Hudson*, 109 S. Ct. at 2254—the sixth and seventh sentences of Section 405(g) outline explicitly the procedures applicable after the case is remanded. The second clause of the sixth sentence of Section 405(g) states that "after the case is remanded," the "Secretary . . . shall file with the [district] court any such additional and modified findings of fact and decision, and a transcript . . . ." Under the seventh sentence, the additional or modified findings of fact and decision shall then be reviewable to the same extent as the original findings of fact and decision. The language of the statute provides the Secretary with the opportunity for effective appellate review after the conclusion of all the proceedings in the district court.

Despite this Court's case law, the Secretary in this case still responds only with the unsupported assertion that "nothing in Section 405(g) *requires* the Secretary," after a remand based on legal error in the Secretary's first decision, to file with the district court a new decision in favor of the claimant. (Br. at 45; Pet. at 17 n.10). It appears that the statute does require the Secretary's return to the district court, see pp. 23-24 & n.19, *supra*, and that the Secretary's argument contravenes the plain language ("shall file") and statutory purpose of Section 405(g), as well as his own prior interpretations. *Brown v. Sec'y of HHS*, 747 F.2d at 884 (court deferred to Secretary's assertion that, under the second clause of the sixth sentence, he will return to the district court following any remand).

In any event, the important fact under the *Coopers & Lybrand* test remains that the Secretary has statutory authority that *allows* him to appeal even if he grants benefits on remand.<sup>30</sup> There is no dispute that, following the award of benefits, the Secretary may file his decision with the district court and can then obtain a final judgment.<sup>31</sup> Indeed, following an award of benefits, the

<sup>30</sup> In solitary "support" of his claim to the contrary (Br. at 42-43 n.33), the Secretary cites the irrelevant testimony of Harold Packer, an SSA official, twenty years after Section 405(g) was enacted. That testimony concerns *initial* appeals of the decision of the SSA, and does not even address the issue in this case—when the SSA may *return* to the district court following a remand.

<sup>31</sup> We fail to understand how the Secretary can refer to this practice as "novel and awkward" (Br. at 45) since he has frequently engaged in it and has conceded that it is the proper approach under Section 405(g). (Br. at 44 n.35). *E.g.*, *Sullivan v. Hudson*, 109 S. Ct. at 2252 ("The district court, pursuant to the Secretary's motion, dismissed respondent's action . . ."); *Papazian v. Bowen*, 856 F.2d 1455, 1455 (9th Cir. 1988) ("The Appeals Council's decision [on remand] was adopted by the district court, which entered a 'final judgment,' . . . prepared by the Office of the United States Attorney . . ."); *Miles v. Bowen*, 632 F.Supp. 282, 283 (M.D. Ala. 1986) (Secretary moved to affirm his decision granting benefits). Indeed, at least one district court has *required* the Secretary in all cases to file a notice of any favorable

claimant will generally seek fees pursuant to the EAJA. There will thus be proceedings of substance in the district court following the award of benefits, since the claimant's application will require analysis of whether the Secretary's position was "substantially justified." After the district court's final judgment is entered, the Secretary can appeal the decision, including the adverse remand order—a procedure that has been held to be appropriate in the Social Security context.<sup>32</sup>

**B. The District Court's Remand Order Did Not Resolve "An Important Issue Completely Separate From the Merits of the Action."**

The requirement set out in the second part of the test articulated by this Court in *Coopers & Lybrand v. Livesay*, 437 U.S. at 468—that the order must resolve "an important issue completely separate from the merits"—also defeats the use of the collateral order doctrine in this case. First, the district court's order did not resolve an "important issue." Second, the district court's order is intertwined with the ultimate resolution of respondent's claim for benefits. Indeed, the Secretary conceded in his petition that the remand is not "completely separate from the merits of the action" but urged the Court to disregard this defect. (Pet. at 16 n.9).<sup>33</sup>

decision following remand along with the record of proceedings in the case. *Lenz v. Sec'y of HHS*, 641 F. Supp. 144, 145-46 (D.N.H. 1986).

<sup>32</sup> *Barfield v. Weinberger*, 485 F.2d at 698 (holding that Secretary may not appeal remand immediately but must wait until after remand); see *Kier v. Sullivan*, 888 F.2d at 245-47; *Hatcher v. Sec'y of HHS*, No. 88-2918, slip op. at 7 (claimant's appeal of district court's remand order properly taken after new decision by Secretary and affirmance by district court of Secretary's decision); *Copeland v. Bowen*, 861 F.2d at 539 (same); cf. *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 334 (1980) (allowing prevailing party to appeal adverse interlocutory order following final judgment).

<sup>33</sup> Moreover, the first part of the *Coopers & Lybrand* test has not been met because the district court did not conclusively re-

**1. The District Court Did Not Resolve an "Important Issue."**

The district court here simply remanded the case for the Secretary to make the actual, individualized, factual determination whether Mrs. Finkelstein is able to engage in "any gainful activity"—the ultimate determination required by the statute. (Pet. App. 18a).<sup>34</sup> The Secretary's bald assertion that the district court's order "may have seriously adverse consequences for the agency and the public" (Br. at 27) should not be countenanced by this Court. The remand had, according to longstanding SSA policy, no further reach than respondent's particular application for benefits: the SSA does not consider district court opinions to be binding in the adjudication of future cases or in the administration of other claims.<sup>35</sup> Profes-

solve the issue: there is nothing to prevent the district court from reconsidering its prior decision following a return to the district court by either party, see *Messinger v. Anderson*, 225 U.S. 436, 444 (1912), especially since the district court reached its decision without briefing by the parties on the functional impact issue. See 1B J. Moore, J. Lucas & T. Currier, *Moore's Federal Practice* ¶ 0.404[1] at 120-21 (2d ed. 1988) (law of the case doctrine applies where parties have had opportunity to brief the relevant issues).

<sup>34</sup> The Secretary misleadingly asserts again and again that the district court's order resolved an important issue by invalidating the Secretary's longstanding regulations, implicitly on a nationwide basis. (Br. at 4-5, 13, 38 & n.29). An examination of the district court's opinion and order, however, reveals no such invalidation. Neither party asked the district court to rule on the validity of the regulations, and neither the district court nor the court of appeals referred to any invalidation of regulations. See *Cassas v. Sec'y of HHS*, 893 F.2d at 458 (decision that Secretary must consider functional impact in widow's disability case does not necessarily "attack the facial validity" of the regulations). Indeed, in remanding for consideration of the functional impact of Mrs. Finkelstein's heart disease, there was no need for the district court to invalidate the widow's benefits regulations, since they are silent on the terms functional impact and residual functional capacity. 20 C.F.R. §§ 404.1577, 404.1578.

<sup>35</sup> Decisions by the district courts containing "interpretations of the law, regulations, or rulings which are inconsistent with the Secretary's interpretations" have never been considered by the

sor Wright's criticism of the court of appeals' decision in *Cohen v. Perales*, 412 F.2d 44, 48 (5th Cir. 1969), *rev'd sub nom. Richardson v. Perales*, 402 U.S. 389 (1971), is thus particularly penetrating when directed to appeals by the Secretary: "[t]he interest of an institutional litigant in settling questions of law is apparent, but it seems a slender reed for immediate appeal." 15 C. Wright, *et al.*, *Federal Practice & Procedure* § 3914 at 551-52 n.43 (1976).<sup>36</sup>

As Justice Scalia observed last Term, "[t]he importance of the right asserted has always been a significant part of our collateral order doctrine." *Lauro Lines S.R.L. v. Chasser*, 109 S. Ct. at 1980 (concurring opinion). The rights this Court has held to be sufficiently important to allow an immediate appeal are far graver

ALJs as "binding on future cases simply because the case is not appealed" to the court of appeals. J. Mashaw, *et al.*, *Social Security Hearings & Appeals* 141; see Kubitschek, *A Re-Evaluation of Mathews v. Eldridge in Light of Administrative Shortcomings and Social Security Nonacquiescence*, 31 Ariz. L. Rev. 53, 60-61 & nn. 48-50 (1989).

<sup>36</sup> The Secretary's reliance (Br. at 27-30) on *Richardson v. Perales*, 402 U.S. 389 (1971), *rev'd Cohen v. Perales*, 412 F.2d 44, 48 (5th Cir. 1969), is misplaced for three reasons. First, this Court reversed the decision of the Fifth Circuit without reaching the jurisdictional issue decided by the court of appeals; the issue was not briefed in this Court by either side and apparently was not considered by the Court. Second, the *Perales* court of appeals did not have the benefit of this Court's recent finality jurisprudence (including *Hudson* and *Coopers & Lybrand* and its progeny), which has developed considerably in the two decades since that case was decided. See pp. 9-10 & nn. 4-6, *supra*. Indeed, the continued vitality of the jurisdictional decision of the court of appeals in *Perales* is questionable even within the Fifth and Eleventh Circuits. See *Newpark Shipbuilding & Repair, Inc. v. Roundtree*, 723 F.2d 399 (5th Cir.) (en banc), *cert. denied*, 469 U.S. 818 (1984); *Taylor v. Heckler*, 778 F.2d 674, 677 (11th Cir. 1985) ("This circuit treats all remand orders to the Secretary as interlocutory orders, not as final judgments" (emphasis in original)). Finally, the court of appeals in *Perales* noted that the exact situation presented by this case—"an order *sua sponte* by the court for the taking of additional evidence"—is *not* immediately appealable. 412 F.2d at 48.

than the right the Secretary seeks to protect here. For example, the right not to stand trial based on the Double Jeopardy Clause's guarantee that trial *will not occur* twice for the same offense is such a right, *Abney v. United States*, 431 U.S. at 659, as are the rights of the President of the United States and the Attorney General not to stand trial based on claims of official immunity from suit, *Nixon v. Fitzgerald*, 457 U.S. at 742-43, *Mitchell v. Forsyth*, 472 U.S. at 530. Surely, the right not to hold a hearing on remand in this single case does not rise to that level of importance.<sup>37</sup>

## 2. The Issue Is Not "Completely Separate From the Merits."

The requirement that the district court order must have resolved an important issue "completely separate from the merits of the action" derives from the principle that there should not be piecemeal review of "steps towards final judgment . . ." *Cohen v. Beneficial*, 337 U.S. at 546. Yet a remand (particularly in a Social Security case) is nothing but a step "towards final judgment," *id.*, entwined with the merits of the action.

In determining whether to remand in a Social Security case, the district court examines the factual record and applicable legal principles, as it did in this case. As the

<sup>37</sup> The Secretary relies on several articles that supposedly "furnish instructive accounts of the adverse consequences" of the Federal Circuit's refusal to allow the Department of Commerce to appeal immediately remand orders by the Court of International Trade. (Br. at 39 n.30). Those consequences, however, flowed in large part from the fact that the Department of Commerce orders in question are reviewed in only one court of first instance, the decisions of which are reviewed in only one court of appeals. Moreover, the commentaries by Horgan, 3 Fla. Int'l L.J. 187, 202-04 (1988), and by Layton, 3 Fla. Int'l L.J. 167, 177 (1988), recognize that the best approach for the Department of Commerce would be to adopt the suggestion of the Federal Circuit and seek certification under 28 U.S.C. § 1292(d)(1) (1982), the parallel of Section 1292(b), while the third commentary seems unaware of the existence of Section 1292(d)(1), Hunter & McInerney, 3 Fla. Int'l L.J. 151, 158 n.39 (1988).

Court explained in *Sullivan v. Hudson*, 109 S. Ct. at 2254:

Where a court finds that the Secretary has committed a legal or factual error in evaluating a particular claim, the district court's remand order will often include detailed instructions concerning the scope of the remand, the evidence to be adduced, and the legal or factual issues to be addressed.

There is generally substantial overlap between the factual and legal issues to be decided in the district court prior to remand and the issues that ultimately must be resolved in determining entitlement to benefits.<sup>38</sup> In contrast, orders that are "completely separate from the merits" involve no inquiry into the factual or legal issues whose resolution forms the basis of the final decision. *E.g.*, *Cohen v. Beneficial*, 337 U.S. at 546 (the need to post a bond is completely separate from merits of action); *Stack v. Boyle*, 342 U.S. 1, 12 (1951) (Jackson, J., concurring) (amount of bail is "entirely independent of the issues to be tried").

### III. NO INSTITUTIONAL INTERESTS WOULD BE SERVED BY DISREGARDING THE RULE OF FINALITY IN THIS CASE.

The Secretary claims that institutional efficiency would be served by his proposed rule because a rule of non-appealability "also would impose an unwarranted burden" on the SSA, which would be required "to conduct additional proceedings that are both unnecessary and wasteful of scarce resources . . . ." (Br. at 38). That is

<sup>38</sup> See *Harper v. Bowen*, 854 F.2d at 679, 682 (remand because of ALJ's improper application of legal standard "inextricably entwined with the merits"); *Farr v. Heckler*, 729 F.2d at 1427 ("The [district] court's affirmance of the ALJ's categorization of Farr's [residual functional capacity] as sedentary is intertwined with the merits."); *Tookes v. Harris*, 699 F.2d at 529 ("A review of the remand order is intertwined with a review of the merits."). Here, the district court's order required further consideration of the evidence before a final determination of the ultimate factual issue could be made. Unlike, for example, the need to post a bond, the inquiry into the functional impact of a claimant's impairment relates directly to the merits of the application for benefits.

astounding. Under SSA policy, the district court order affected *only* respondent's application in this case. While the finality rule often requires litigants to endure long trials following classic interlocutory orders (*e.g.*, motions to dismiss indictments, summary judgment motions, motions to dismiss in civil actions), an administrative hearing on remand requires no more than *a few hours* of an ALJ's time.<sup>39</sup> Moreover, the Secretary's position that his rule would promote efficiency is wrong. Indeed, his rule would unduly burden the courts, the claimants, and the SSA itself.

#### A. The Secretary's Proposal Would Improperly Burden the Courts.

The practical result of adopting the Secretary's position would be to make appellate review of district court remands to all administrative agencies routine, imposing a heavy burden on circuit judges, "who—more than any other segment of the federal judiciary—are struggling desperately to keep afloat in the flood of federal litigation." *Board of Trustees v. Sweeney*, 439 U.S. 24, 26 (1978) (Stevens, J., dissenting). Accordingly, this Court should, as Professor Wright and his colleagues suggest, "guard against continuing expansion of the claims that provide routine access to collateral order appeal." 15 C. Wright, *et al.*, *Federal Practice & Procedure* § 3911 at 165 (Supp. 1990).<sup>40</sup>

Every year, the SSA receives thousands of remands, generally comprising approximately half of all district

<sup>39</sup> ALJs disposed of an average of 36 hearings each per month in fiscal 1988, expected to increase to 37 in fiscal 1989. Thus, on average, an ALJ disposes of 432 to 444 hearings annually. Based on a (generous) 2,000 hour work year, an ALJ would spend about four and a half hours on a hearing. SSA, *1989 Annual Report* at 33. The transcript of the hearing before the ALJ in this case, for instance, comprises only 33 pages.

<sup>40</sup> As Professor Wright explained, "[d]ouble jeopardy claims permit routine appeal and appeals have proliferated. Denial of motions to disqualify opposing counsel once permitted routine appeals, appeals multiplied riotously, and the rule had to be changed." *Id.*

court dispositions of Social Security cases. See p. 30 n.25, *supra*, and reports cited therein. The Secretary's proposal would effectively double the number of Social Security cases eligible for appellate review. The Secretary's contention that this decision implicates interests "far beyond the Social Security disability program" (Br. at 39) is true only if the Court adopts his proposal: because of the specific nature of district court review under Section 405(g), a finding that this order is not appealable does not necessarily implicate orders involving other agencies. On the other hand, the burden on the court system imposed by adopting the Secretary's proposal could be far greater than the thousands of SSA cases remanded annually, enabling agency after agency to take interlocutory appeals at will, and requiring litigants to appeal remand orders to preserve their rights.

#### **B. The Secretary's Proposal Would Unfairly Burden Claimants.**

The burden of appellate review falls squarely on Social Security claimants. Thousands of claimants are already caused tremendous hardship by the multiple levels of review needed to secure the benefits they should have received in the first instance.<sup>41</sup> According to the Government Accounting Office, disability claimants must wait, on average, more than a year before an ALJ makes an initial decision on their claims. U.S. Gen. Accounting Office, *Social Security: Selective Face-to-Face Interviews With Disability Claimants Could Reduce Appeals* 13, Table 1.2 (GAO/HRD-89-22 April 1989). For those claimants who then proceed to the district court—their fifth level of proceedings—the average length of time between their initial application and the completion of proceedings following a district court remand is close to four years. *Id.*

<sup>41</sup> A disappointed claimant for widow's benefits is subjected to four levels of administrative proceedings: consideration and reconsideration by a state agency (20 C.F.R. §§ 404.905 (1989), 404.909(a)(1) (1989)); a hearing by an ALJ (42 U.S.C. § 405(b)(1) (1982); 20 C.F.R. § 404.929 (1989)); and review by the Appeals Council (20 C.F.R. § 404.967 (1989)).

Because of the Secretary's appeal, Mrs. Finkelstein, who applied more than six years ago for benefits she had already been determined to deserve, has not even reached the remand stage. The burden imposed by such delay during appellate review is already unbearable.<sup>42</sup> Remarkably, the Secretary asks this Court to inject yet a sixth level of routine proceedings into the Social Security process, adding, on average, more than a year to the resolution of thousands of claims.<sup>43</sup>

#### **C. Immediate Appellate Review Would Be Inefficient for the SSA.**

The Secretary ignores the fact that he will be required to defend claimants' appeals of remand orders. If a remand order is final under Section 1291, all parties must immediately appeal or waive their rights to have appellate review. Thus, routine appealability would not ease any burden on the Social Security Administration. It would simply shift the Secretary's resources from deciding claims to litigating appeals, a far more burdensome task. The costs to the executive branch of litigating an appeal are indisputably higher than those of holding an administrative hearing on remand (the former requires dozens, perhaps hundreds of hours of preparation by Department of Justice and SSA employees, while the latter requires only a few hours of an ALJ's time). Those costs will be multiplied by the thousands of district court remands made every year because claimants and the Secretary will find it necessary to appeal immediately to preserve their rights. Efficiency can be better served

<sup>42</sup> See Diller & Morawetz, *Intracircuit Nonacquiescence and a Breakdown of the Rule of Law: A Response to Estreicher & Revesz*, 99 Yale L.J. 801, 815-16 (1990); Kubitschek, 31 Ariz. L. Rev. at 67-72.

<sup>43</sup> The average civil case in the courts of appeals takes nearly eleven months from the filing of a notice of appeal to final disposition (Annual Report of the Director of the Administrative Office of United States Courts 156 (1988)); that must be added to the sixty days either party has to file its notice of appeal in a civil case in which the Secretary is a party (28 U.S.C. § 2107; Fed. R. App. P. 4(a)(1)).

by first holding the hearing on remand, after which, in many cases, the parties may be satisfied and neither may wish to have further contested proceedings in the district court.

#### IV. THE SECRETARY HAS AN ADEQUATE ABILITY TO OBTAIN REVIEW OF ISSUES HE DEEMS IMPORTANT.

The Secretary has a number of ways to obtain appellate consideration of issues he considers important. First, as set forth above (see pp. 37-40, *supra*), after a district court remand, the Secretary or the claimant may return to the district court for further proceedings; an appeal may then be taken and plenary consideration obtained of the issue that initially prompted the remand. Moreover, the 10,000 to 30,000 cases appealed from the SSA annually ensure the Secretary's ability to raise important issues in the appropriate procedural posture. Indeed, the issue underlying this very appeal—whether the Secretary must consider the functional impact of a widow's impairment—provides a perfect example of this point: appellate consideration of the issue did not depend on a holding in this case that remands are appealable. The court of appeals in this case correctly predicted that other opportunities would arise for appellate consideration of this issue. (Pet. App. 11a-12a; 869 F.2d at 220). Recently, both the First and Second Circuits have given plenary consideration to this precise issue and held that the Secretary must consider the impairment's functional impact. *Cassas v. Sec'y of HHS*, 893 F.2d at 457-59; *Kier v. Sullivan*, 888 F.2d at 245-47. This issue is also *sub judice* in the Tenth Circuit in *Mesa v. Sec'y of HHS*, No. 89-2024 (app. filed January 25, 1989); and the Fourth Circuit in *Bennett v. Sullivan*, No. 89-1748 (March 16, 1990), has recently requested briefing to address the application to widow's benefits of *Sullivan v. Zebley*, 110 S. Ct. 885 (1990) (functional impact analysis applied to children's disability claims). Numerous

district court decisions—in a posture ripe for appellate review—have also decided this issue.<sup>44</sup>

In addition, the availability of certification under Section 1292(b) and mandamus under Section 1651 for review of remands to administrative agencies in appropriate cases provides sufficient relief for the Secretary without requiring this Court to create a new rule of appellate jurisdiction.<sup>45</sup> As the Court explained in *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. at 378 n.13, that availability further supports the court of appeals' conclusion that it had no appellate jurisdiction:

[I]t is not necessary . . . to create a general rule permitting the appeal of all such orders. . . . Ultimately, if dissatisfied with the result in the district court and absolutely determined that it will be harmed irreparably, a party may seek to have the question certified for interlocutory appellate review pursuant to 28 U.S.C. § 1292(b) . . . and, in the exceptional circumstances for which it was designed, a writ of mandamus from the court of appeals might be available.<sup>46</sup>

<sup>44</sup> *E.g.*, *Rizzo v. Sec'y of HHS*, 708 F. Supp. 520, 522-23 (W.D.N.Y. 1989); *Brown v. Sullivan*, 724 F. Supp. 76, 77 (W.D.N.Y. 1989) (Secretary's decision was reversed and remanded "solely for the computation of benefits"); *Headlee v. Heckler*, 708 F. Supp. 1167, 1171 (D. Colo. 1987) (same), *EAJA award aff'd*, 869 F.2d 548, 552 (10th Cir.), *cert. denied*, 110 S. Ct. 507 (1989); *Hamby v. Heckler*, 607 F. Supp. 331, 335 (W.D.N.C. 1985). When the Secretary purported to appeal this case, he was at the same time considering whether to appeal three district court decisions in other circuits raising the same controversy. (Brief for Appellant at 9 (filed 6/6/88)).

<sup>45</sup> *E.g.*, *Colon v. Sec'y of HHS*, 877 F.2d at 151 (finding mandamus jurisdiction under All Writs Act); *McCoy v. Schweiker*, 683 F.2d 1138, 1141 n.2 (8th Cir. 1982) (en banc) (taking jurisdiction under Section 1292(b)); *Torres v. Sec'y of HHS*, 677 F.2d 167, 168 (1st Cir. 1982) (same).

<sup>46</sup> *Accord Van Cauwenberghe v. Biard*, 486 U.S. at 529-30; *Tookes v. Harris*, 699 F.2d at 529 ("The 'safety valve' in 28 U.S.C. § 1292(b) . . . cushions any injustice which might result from the final-judgment rule."); *Bachowski v. Usery*, 545 F.2d 363,

As Professor Wright predicted, the passage of Section 1292(b) "may make it appropriate to curtail further growth of hardship and collateral order appeals under § 1291. Section 1292(b) appeals may be better controlled, and do not raise any danger that failure to seek or perfect an appeal will destroy the right to later review." 16 C. Wright, *et al.*, *Federal Practice & Procedure* § 3929 at 146-47 (1977). In the years since Professor Wright's observation, this Court has consistently restricted the availability of immediate appeal before final judgment.

### CONCLUSION

For the reasons discussed above, the decision of the court of appeals should be affirmed.

Respectfully submitted,

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371 (3d Cir. 1976); *Harper v. Bowen*, 854 F.2d at 680 (appeal dismissed; Secretary should have petitioned district court for Section 1292(b) certification); *Barfield v. Weinberger*, 485 F.2d at 697 (same); *cf. Badger-Powhatan v. United States*, 808 F.2d 823, 826 (Fed. Cir. 1986) (same, in appeal by Dep't of Commerce, with respect to Section 1292(d)(1)); *Cabot Corp. v. United States*, 788 F.2d 1539 (Fed. Cir. 1986) (same); *see also McCoy v. Schweiker*, 683 F.2d at 1141 n.2 ("Absent [Section 1292(b)] certification, there would be no appellate jurisdiction in this court.").

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No. 89-504

Supreme Court, U.S.  
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**In the Supreme Court of the United States**

OCTOBER TERM, 1989

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LOUIS W. SULLIVAN, SECRETARY  
OF HEALTH AND HUMAN SERVICES, PETITIONER

v.

MARILYN FINKELSTEIN

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ON WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

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**REPLY BRIEF FOR THE PETITIONER**

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**In the Supreme Court of the United States**

OCTOBER TERM, 1989

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No. 89-504

LOUIS W. SULLIVAN, SECRETARY  
OF HEALTH AND HUMAN SERVICES, PETITIONER

*v.*

MARILYN FINKELSTEIN

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*ON WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT*

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**REPLY BRIEF FOR THE PETITIONER**

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In our opening brief, we set forth two approaches to this case, each of which is, in our view, independently sufficient to support jurisdiction of the Secretary's appeal under 28 U.S.C. 1291. Under the narrower approach, whether or not the district court's order was final in the sense of completely terminating all judicial proceedings on the merits, it does come within the special class of cases in which a right of appeal nevertheless has been recognized in furtherance of the practical considerations underlying the finality principle. Gov't Br. 36-45. Second, and more broadly, under the express terms of 42 U.S.C. 405(g)—as well as under general principles of finality and judicial review of agency action developed by this Court—the district court's decision was final in the fullest sense of the jurisdiction granted to appellate courts by 28 U.S.C. 1291. Gov't Br. 12-36.

Neither of these arguments has been refuted by respondent. Indeed, respondent's effort, by brute force, to transpose into the administrative-review context precedents of this Court that cannot sensibly be translated verbatim to that setting ignores the distinct and important question of appealability raised in this case. This question—of how the finality rule applies to the right of an Executive Branch agency to appeal a district court order that both invalidates an administrative decision and remands the matter to the agency for further proceedings under different legal standards—has not been definitively addressed by this Court. But as we have shown (Pet. 23-25; Reply Br. Pet. Stage 8-9; Gov't Br. 28-29 & n.21), the great weight of authority in the lower courts over the past several decades firmly supports the agency's right of appeal in these circumstances—a right that has been recognized in cases arising under the Social Security Act as well as other federal statutes. See generally *Occidental Petroleum Corp. v. SEC*, 873 F.2d 325, 328-332 (D.C. Cir. 1989). And significantly, in the leading lower court case on the subject, *Cohen v. Perales*, 412 F.2d 44, 48-49 (5th Cir. 1969), this Court granted review and reversed the Fifth Circuit's ruling on the merits, without questioning the Fifth Circuit's holding (and supporting rationale) that it had jurisdiction over the Secretary's appeal. *Richardson v. Perales*, 402 U.S. 389 (1971). See Gov't Br. 27-28.<sup>1</sup> Respondent now asks this Court to

<sup>1</sup> Since this Court's jurisdiction depended on the correctness of the Fifth Circuit's ruling, respondent's attempt (Br. 42 n.36) to minimize the significance of *Cohen v. Perales* by characterizing the Court's decision as not "reaching" the threshold jurisdictional issue is without merit. Moreover, although respondent also attempts (Br. 42 n.36) to discount *Cohen v. Perales* on the ground that the Fifth Circuit there did not have the benefit of the Court's more recent decisions under 28 U.S.C. 1291, those decisions in fact support the correctness of the jurisdictional ruling in *Perales*. See pages 3-12, *infra*.

Respondent's related assertion (Br. 42 n.36) that "*Perales* is questionable even within the Fifth and Eleventh Circuits" is equally

sweep this past practice and precedent aside, and she does so without pointing to any adverse consequences that have resulted to date from recognition of an agency's right of appeal in circumstances such as these.

1. The narrower of the two approaches suggested in our opening brief builds upon *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). The question before the Court under that approach is whether the rationale and underlying principles of *Cohen* and its progeny support appealability here, not, as respondent seems to argue (Br. 32-36), whether that result is compelled by mechanical application of the precise terminology used in the very different context of *Cohen* and other cases involving on-going proceedings in a district

without merit. As support for this proposition in the Fifth Circuit, respondent cites *Newpark Shipbuilding & Repair, Inc. v. Roundtree*, 723 F.2d 399 (en banc), cert. denied, 469 U.S. 818 (1984), but that case involved the distinct question of the finality of an administrative decision, and the court there did not even cite, much less overrule, *Perales*. As support for this proposition in the Eleventh Circuit, respondent cites *Taylor v. Heckler*, 778 F.2d 674, 677 (1985). Subsequent Eleventh Circuit decisions, however, have recognized the Secretary's right of appeal, despite the inclusion of a remand in the district court's order. See *Pickett v. Bowen*, 833 F.2d 288, 290-291 (1987); *Huie v. Bowen*, 788 F.2d 698, 701-703 (1986); *North Broward Hosp. Dist. v. Bowen*, 808 F.2d 1405, 1408 n.3 (1987), vacated on other grounds, 485 U.S. 1018 (1988). Moreover, in *Taylor v. Heckler* itself, the panel unequivocally expressed the view that under the provisions of 42 U.S.C. 405(g) upon which we rely, an order holding the decision of the Secretary unlawful and remanding for a new round of proceedings is an appealable final judgment, but the panel felt bound by a prior Eleventh Circuit decision to the contrary that was itself a departure from *Perales*. See 778 F.2d at 676-677.

Finally, respondent fails in her attempt to distinguish *Perales* by relying on the Fifth Circuit's statement there that "'an order sua sponte by the court for the taking of additional evidence' is not immediately appealable." Resp. Br. 42 n.36 (quoting 412 F.2d at 48). The remand in this case was not an interlocutory remand for the receipt of additional evidence as a prelude to review; rather, the remand followed the district court's review of the Secretary's decision on the merits.

court.<sup>2</sup> In our view, the question whether *Cohen* supports appealability here must be answered in the affirmative.

a. Section 28 U.S.C. 1291 grants the courts of appeals jurisdiction of appeals from all "final decisions" of the district courts. Ordinarily, there is no "final decision" until the district court has entered a final judgment in the case—"until there has been a decision by the District Court that 'ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.'" *Midland Asphalt Corp. v. United States*, 109 S. Ct. 1494, 1497 (1989). As we explain below (see pages 13-20, *infra*), the district court's order in this case was final in this sense because it ended the relevant litigation concerning the validity of the particular agency action before the court on judicial review. But even if we assume, *arguendo*, that the order was not a final judgment, it nevertheless was a "final decision" for purposes of Section 1291.

As the Court has explained, Section 1291 "[does] not uniformly limit appellate jurisdiction to 'those final judgments which terminate an action.'" *Abney v. United States*, 431 U.S. 651, 658 (1977) (quoting *Cohen*, 337 U.S. 545). Rather, "[I]t is a final decision that Congress has made reviewable. . . . While a final judgment always is a final decision, there are instances in which a final decision is not a final judgment." *Abney*, 431 U.S. at 658 (quoting *Stack v. Boyle*, 342 U.S. 1, 12 (1951) (Jackson, J., concurring)). See also *Mitchell v. Forsyth*, 472 U.S. 511, 524 (1985) ("a decision 'final' within the meaning of § 1291 does not necessarily mean the last order possible to be made in a case"). The statutory reference to "final decisions" thus suggests a flexibility that is harder to read into the term "final judgment."

<sup>2</sup> As the Court explained in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 170 (1974): "No verbal formula yet devised can explain prior finality decisions with unerring accuracy or provide an utterly reliable guide for the future."

ment."<sup>3</sup> And the Court has repeatedly emphasized that the inquiry into finality requires an evaluation of the "competing considerations" underlying questions of appealability. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 171 (1974); see also *Dickinson v. Petroleum Conversion Corp.*, 338 U.S. 507, 511 (1950). *Cohen* and its progeny thus do not represent an "exception" to the general principle of finality under 28 U.S.C. 1291, but rather an application of that principle to a discrete category of cases involving orders entered in the course of on-going proceedings in the district court.<sup>4</sup>

<sup>3</sup> Respondent's reliance (Br. 34 n.28) on *Ex parte Tiffany*, 252 U.S. 32, 36 (1920), for the proposition that the term "final decision" in what is now Section 1291 means the same thing as "final judgment" therefore is inconsistent with the Court's more recent understanding. *Harrington v. Haller*, 111 U.S. 796, 797 (1884), also cited by respondent (Br. 34 n.28), involved a different jurisdictional statute governing this Court's jurisdiction to review decisions of a territorial court.

On a similar point, respondent also miscites P. Bator, D. Meltzer, P. Mishkin & D. Shapiro, *Hart & Wechsler's The Federal Courts and the Federal System* (3d ed. 1988). That work does not, as respondent implies (Br. 34 n.28), argue that "final decision" (in Section 1291) is a more restrictive term than "final judgment" (in 28 U.S.C. 1257). To the contrary, in the discussion cited by respondent, the work simply proposes several possible bases for distinguishing between the sections, several of which—including "[t]he language of the two statutes"—cut in favor of a broader reading of Section 1291. P. Bator et al., *supra*, at 1812.

In any event, the term "final judgment" in 28 U.S.C. 1257, which governs this Court's jurisdiction to review the decisions of state courts, also has been given a practical construction. That construction permits review by this Court of a distinct federal issue resolved by a state appellate court in certain circumstances, even where further proceedings, including a trial, remain to be conducted in a lower state court on remand. See generally *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 477-485 (1975). It is significant that in those cases, as here, there was no interference with on-going proceedings in the court whose decision was deemed "final."

<sup>4</sup> A similar application of, rather than exception to, the finality requirement in Section 1291 is embodied in Fed. R. Civ. P. 54(b). In *Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427, 436-437 (1956),

Of course, *Cohen* does represent an exception to the general rule under Section 1291 that ordinarily there is no "final decision" until the district court has entered a final judgment that terminates the entire litigation. But the Court has not held that orders satisfying the precise terminology used in *Cohen* and its progeny exhaust the category of orders that qualify for appeal prior to entry of a judgment formally terminating the litigation. To the contrary, the Court has held that (quite aside from the "collateral order" doctrine) an order staying proceedings pending resolution of state-court proceedings on the same issue was a "final decision" because, although no final judgment had been entered, the order meant that as a practical matter there would be no further litigation on the issue in the district court. *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 9-10 (1983). See also *Foray v. Conrad*, 47 U.S. (6 How.) 201, 203 (1848); *Brown Shoe Co. v. United States*, 370 U.S. 294, 307-311 (1962); cf. *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 467-468 (1978) (because order refusing to certify a class did not terminate the litigation, it could be appealed under Section 1291 only if it came within "an appropriate exception" to the final-judgment rule; respondents relied solely on the "collateral order" exception articulated in *Cohen*).

b. There is no need here, however, for the Court to articulate any new or distinct exception to the final-judgment rule. Taking into account the structurally different character of the present case—the fact that the action alleged to preclude "finality" is the remand to a different Branch—it is clear that the principles underlying *Cohen* and its progeny fully support the Secretary's right of appeal. Those principles, like the

the Court explained that Rule 54(b) is not in derogation of the finality requirement; rather, it is an authorization to release for appeal "final decisions" on one or more, but less than all, claims in multiple-claim actions.

finality requirement itself, must be given a "practical rather than a technical construction." 337 U.S. at 546. Ultimately, the inquiry must be whether allowing an appeal is consistent with the purposes of the finality requirement, and each prong of the *Cohen* formulation should be interpreted in light of those purposes.<sup>5</sup>

i. The first requirement under the *Cohen* doctrine—that the district court's order "conclusively determine the disputed question," *Coopers & Lybrand*, 437 U.S.

<sup>5</sup> Respondent's assertion (Br. 33) that the precise articulation of the factors in *Coopers & Lybrand* is "fully applicable in the context of judicial review of administrative agency action"—and requires dismissal of the Secretary's appeal here—is incorrect. Respondent principally relies for this assertion upon *FTC v. Standard Oil Co.*, 449 U.S. 232 (1980), but that case involved the completely different issue of the finality of an administrative decision.

Ironically, respondent also cites (Br. 33) *Occidental Petroleum Corp. v. SEC*, 873 F.2d 325, 328-332 (D.C. Cir. 1989), for the same point. In *Occidental Petroleum*, the court of appeals in fact sustained the agency's right of appeal, despite the inclusion of a remand in the district court's order, and it specifically recognized the need for a practical application of the *Cohen* factors in that setting. 873 F.2d at 330-331. The court observed: "At least in the present context, the distinction between a final order and an interlocutory order that is nonetheless appealable under the collateral order doctrine is, as a practical matter, purely terminological." *Id.* at 331.

Finally, respondent errs in citing (Br. 33) *Seatrains Shipbuilding Corp. v. Shell Oil Co.*, 444 U.S. 572 (1980) (Br. 33) in support of her argument that the Secretary could not appeal in this case under the principles of *Cohen*. The Court in *Seatrains* did not reach the question whether the district court's order was final in all respects, because it found that the district court had properly exercised its authority to release for appeal a "final decision" relating to one aspect of the case. See note 4, *supra*. The sentence quoted by respondent (444 U.S. at 583 n.21) emphasizes the finality of the decision being appealed, even assuming (though the Court clearly did not decide, see *id.* at 581 n.17) that the disposition of the case as a whole was not "final" for purposes of 28 U.S.C. 1291. Moreover, in *Seatrains*, the appeal in question was not taken by the agency (as in this case), but by the private party who had successfully urged the district court to set aside the agency action.

at 468—is clearly satisfied. Respondent reduces her answer on this point to a footnote, observing (Br. 40-41 n.33) that “there is nothing to prevent the district court from reconsidering its prior decision following a return to the district court by either party.” This aspect of the *Cohen* test, however, was intended to exclude orders that are “inherently tentative,” such as the order denying class certification in *Coopers & Lybrand*. See *Moses H. Cone*, 460 U.S. at 12 n.14 (quoting 437 U.S. at 469 n.11). Accord *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 277-278 (1988); see also *Cohen*, 337 U.S. at 546 (statute “disallow[s] appeal from any decision which is tentative, informal or incomplete”). Contrary to respondent’s contention, the mere possibility, which is present in virtually every case, that a prior ruling might be altered for cause shown prior to entry of a final judgment does not render all such orders “‘inherently tentative’ in the sense of that phrase in *Coopers & Lybrand*.” *Moses H. Cone*, 460 U.S. at 12-13 n.14. It is therefore sufficient here that the district court’s ruling regarding the legal insufficiency of the Secretary’s reliance on the Listing was made “with the expectation that [it] will be the final word on the subject addressed.” *Ibid*.

ii. With respect to the second factor articulated in *Cohen* and related cases, the point, as emphasized in our opening brief (Gov’t Br. 40-41), is that the issue on appeal is functionally separate from the rest of the case in two critical respects. First, because the cause is no longer before the district court, but rather has been remanded in its entirety to the Secretary, there can be no disruption of an ongoing trial process in the district court—a principal danger that underlies this aspect of the *Cohen* limitation of appellate jurisdiction. See *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 202 (1988) (inquiring whether appeal will be “disruptive of ongoing proceedings”); *Moses H. Cone*, 460 U.S. at 31 (Rehnquist, J., dissenting) (Section 1291 “is a con-

gressional command to the federal courts of appeals not to interfere with the district courts’ management of ongoing proceedings”).<sup>6</sup>

Second, since the agency on remand is governed by the district court’s ruling on the matter sought to be appealed in this case, that matter cannot be reconsidered by the agency or affected by its new decision. Nor will it be an issue in the district court if and when a later action for review is brought by the claimant, except in the sense that any court has the power to reverse itself on an earlier ruling in the same proceeding—a bare possibility that, as we have already shown (see page 8, *supra*), is insufficient to preclude appealability. See *Abney*, 431 U.S. at 660 (quoting *Cohen*, 337 U.S. at 546 (matter appealed “will not ‘affect, or . . . be affected by,’ subsequent proceedings in district court”)). Nor, contrary to respondent’s contention (Br. 43-44), does the existence of some factual overlap between the issue being appealed and the proceedings on remand foreclose the Secretary’s right of appeal. See *Mitchell v. Forsyth*, 472 U.S. at 528-529 & n.10.<sup>7</sup>

<sup>6</sup> The Court has observed that the second requirement under the *Cohen* formulation—the separability of the issue to be appealed—is “[c]losely related to the ‘threshold requirement of a fully consummated decision.’” *United States v. MacDonald*, 435 U.S. 850, 859 (1978). Because a district court order holding the Secretary’s decision unlawful and remanding for further proceedings under different legal standards constitutes a final rejection of the particular decision of the Secretary that is before the court, an appeal by the Secretary is not “likely to eliminate a trial judge’s opportunity for reconsideration.” *Budinich*, 486 U.S. at 202.

<sup>7</sup> Respondent also argues (Br. 41-43) that an appeal should not be allowed because the district court did not resolve an “important issue.” Yet it is hard to see how a decision effectively invalidating a policy of the Secretary embodied in formal regulations can be regarded as anything less. Respondent disputes (Br. 41 n.34) that the district court’s order had that effect. But the district court affirmed the Secretary’s finding that respondent did not establish that she had an impairment that met or equalled a listed impairment. Pet. App. 15a-16a. If the district court had respected the

iii. With respect to the third factor—the “effective unreviewability” of the ruling at a later stage—we strongly disagree with both of respondent’s arguments. The fact that the claimant may return to the district court if she *loses* in the rehearing at the administrative level (see Resp. Br. 37-38) is and should be analytically irrelevant. The notion of reviewability as developed in *Cohen* and its progeny is one that turns on whether the decision now being appealed will be subject to later review if the other party to the litigation ultimately *prevails*. After all, reviewability (in the court of appeals) if the claimant loses at the administrative level depends entirely on facts beyond the Secretary’s control—whether the claimant seeks judicial review of the Secretary’s new decision and whether, if she does, she prevails in the district court.

Respondent argues in the alternative (Br. 38-40) that the district court’s decision at this stage will be review-

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statutory text (42 U.S.C. 423(d)(2)(B) (1982 & Supp. V 1987)) and the Secretary’s implementing regulations, that finding would have compelled affirmance of the Secretary’s decision denying respondent’s claim. See Gov’t Br. 5 n.7. The district court’s insistence on a distinct, individualized assessment of residual functional capacity therefore effectively invalidated the statutory and regulatory limitation on eligibility. Compare *Heckler v. Campbell*, 461 U.S. 458, 465-466 (1983) (lower court’s requirement that additional evidence be introduced on particular types of jobs available for claimant implicitly calls into question validity of medical-vocational guidelines that dictate answer to that question).

Despite respondent’s protestations (Resp. Br. 41, 48), the fact that the same question may arise in some other case that may reach a court of appeals is irrelevant both to the issue of the importance of the district court’s determination and to the issue, discussed below, of the effective unreviewability of that determination. That the question may arise in another case is a fortuity that has never entered into the calculus and should not. And indeed the matter of appealability in dispute here is at least as likely to arise in the context of district court review of administrative regulations that would not be subject to review in any other forum or any other case. Compare Gov’t Br. 39 n.30.

able if the claimant prevails before the Secretary because the Secretary may file the decision in district court for purposes of determining attorney’s fees under the Equal Access to Justice Act (EAJA), 28 U.S.C. 2412. This is an argument we think the Court can accept only by severely straining statutory provisions governing judicial review that were enacted long before the EAJA. Although we agree that it is appropriate for the Secretary to notify the district court of a decision in the claimant’s favor on remand so that EAJA fees may be awarded, the limited, essentially ministerial purpose of that notification does not extend to a review of the merits, either in the district court or the court of appeals. See point 2(b), *infra*.<sup>\*</sup> Indeed, if it did, what would prevent the Secretary from disagreeing with the judgment of his own Appeals Council and asking the district court not to affirm (as respondent apparently believes the Secretary must do) but to reverse, because the Appeals Council made an error on remand? The Secretary has no such authority as a general matter (see

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<sup>\*</sup> All but one of the cases cited by respondent (Br. 23-24, 39 n.31) that refer to the Secretary’s filing with the court any decision on remand that is favorable to the claimant were concerned only with providing a realistic mechanism for the award of attorney’s fees at that point. In each of those cases, the claimant was not yet a “prevailing party” within the meaning of the EAJA at the time of the court’s order setting aside the Secretary’s first decision (which denied benefits) and remanding for further proceedings. See *Sullivan v. Hudson*, 109 S. Ct. 2248, 2255 (1989); pages 17-18, *infra*. None of the cases suggested that the court would take any further action on the merits beyond the essentially ministerial act of entering an order on the basis of the Secretary’s filing in order to trigger the court’s authority to award attorney’s fees under the EAJA. In the remaining case, *Wilson v. Heckler*, 609 F. Supp. 120 (W.D. Mo. 1985), the court expressly stated that the sixth sentence of 42 U.S.C. 405(g) requires a subsequent filing in court *only* where the court has provided for reopening of the administrative proceedings “before making any decision on the merits.” 609 F. Supp. at 122.

Gov't Br. 42 & n.33), and he does not seek it here.<sup>9</sup> But we do not see how it can be denied if the district court's jurisdiction is as expansive as respondent now argues.

2. a. Our broader submission in this case is that the district court's order was "final," in the fullest sense of that term, because it constituted a final rejection of the particular administrative decision before the court on judicial review and therefore ended the relevant litigation on the merits. The finality of the court's order in this regard is not destroyed by the fact that the court, as relief, then remanded the cause to the Secretary for a fresh round of administrative proceedings and the rendering of a new decision. To the contrary, the re-

<sup>9</sup> Respondent errs in relying (Br. 23-24, 38-39) on the sixth sentence of 42 U.S.C. 405(g) as requiring the Secretary to file the new decision on remand with the court in a case such as this. As we have explained (Gov't Br. 21-24), the sixth sentence (including the filing requirement) applies only to a special category of remands initiated by the Secretary or ordered by the court for the receipt of newly discovered evidence. But even if the sixth sentence requirement extended to the present situation, it would not follow that the Secretary would thereby be authorized to challenge the decision of his own Appeals Council awarding benefits. The Secretary lacks a right to judicial review even where he believes that the Appeals Council has committed an error of law. We see no statutory basis for an exception to this preclusion where the Appeals Council's legal error was dictated by a judicial order in proceedings for judicial review of the Secretary's original decision. To the contrary, the seventh sentence of 42 U.S.C. 405(g), which respondent properly insists (Br. 38-39) must be read in tandem with the filing requirement in the sixth sentence, provides that the new findings and decision filed with the court after a remand "shall be reviewable only to the extent provided for review of the original findings of fact and decision."

If the Secretary cannot challenge the decision of his own Appeals Council in the district court, it would seem to follow that he cannot appeal a district court order affirming the Appeals Council's decision. Thus, the Secretary's ministerial district court filing, for purposes of the EAJA, of a remand decision favorable to the claimant does not furnish a suitable procedure for the Secretary to challenge the district court's prior legal ruling in the court of appeals.

mand underscores the finality of the judicial order because it removed all matters concerning respondent's claim for benefits from the court and returned them to the official of another Branch who is responsible for administering the Social Security Act.

In a case such as this, the district court's mandate is fully satisfied, and the claimant receives all the relief to which she is entitled under the court's order, when the Secretary completes the rehearing pursuant to the remand and renders a new decision on the claim for benefits. The possibility of subsequent proceedings for judicial review on the distinct question of the validity of the Secretary's second decision therefore does not detract from the finality, for purposes of 28 U.S.C. 1291, of the court's order holding the Secretary's first decision unlawful.

As explained in our opening brief (Gov't Br. 30-36), this conclusion is supported by general principles governing judicial review of agency action under the Administrative Procedure Act, as well as principles of finality under 28 U.S.C. 1291 and similar statutes.<sup>10</sup> We

<sup>10</sup> We have cited in our opening brief (Gov't Br. 29-30) several of this Court's decisions in cases arising under the Hobbs Administrative Orders Review Act, 28 U.S.C. 2341-2350, which (in Section 2350) limits this Court's review to orders granting or denying interlocutory injunctions and to "final" judgments. (Just last month, this Court granted certiorari in two other such cases in which the court of appeals remanded to the agency, and no jurisdictional question was raised in the petitions or responses or suggested by the Court. See *Norfolk & Western Ry. v. American Train Dispatchers Ass'n*, No. 89-1027 (Mar. 26, 1990); *CSX Transportation, Inc. v. Brotherhood of Railway Carmen*, No. 89-1028 (Mar. 26, 1990).)

The purpose of those citations was not to show that the precise jurisdictional issue raised here has already been addressed and resolved by the Court, but rather to indicate that in a closely analogous context, the litigants and this Court have—quite properly in our view—assumed the existence of jurisdiction. Respondent, however, argues that the cases are not in point because this Court is not limited by the "final judgment" language in Section 2350: in respondent's view (Br. 33-34 n.28), the Court also has jurisdiction

further explained (Gov't Br. 15-21, 27) that those general principles are given expression in the precise context of this case in the statutory provision governing judicial review of agency action under the Social Security Act, 42 U.S.C. 405(g). The fourth and eighth sentences of Section 405(g) expressly contemplate (i) that a judicial order affirming, modifying, or reversing the Secretary's decision is a "final" "judgment," whether or not the court "remand[s] the cause for a rehearing" by the Secretary, and (ii) that any such judgment (*i.e.*, whether "with or without" a remand) "shall be subject to review in the same manner as a judgment in other civil actions."<sup>11</sup> Contrary to respondent's assertion (Br. 13 & n.9, 16), this is not a novel interpretation of 42 U.S.C. 405(g). It was relied upon by the Fifth Circuit in its leading decision rendered more than 20 years ago,

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under 28 U.S.C. 1254(1) to grant certiorari in such cases in the absence of a final judgment. That cannot be. The Hobbs Act makes the courts of appeals the point of entry into the federal judicial system in cases subject to its terms, and Section 2350 is plainly designed to put this Court, as the first reviewing court, in the same relation to the courts of appeals that those courts normally bear to the district courts. Thus, the specific provisions of Section 2350 must prevail over the more general provisions of Section 1254.

<sup>11</sup> In her only effort to grapple with the controlling statutory text, respondent views (Br. 25) the quoted language as merely suggesting that, in determining the appealability of district court orders entered under 42 U.S.C. 405(g), appellate courts should look to the appropriate jurisprudence under Section 1291. But that is not what the fourth and eighth sentences say. They provide that an order such as that at issue here is both a "judgment" and "final"—terms strongly indicative of appealability—and that the judgment "shall be subject to review" in the same "manner" (*i.e.*, subject to the same procedures) as the judgment in other civil actions. There is no suggestion that the judgment, deemed final, might not be subject to appeal at all. Respondent's extended discussion (Br. 20-23) of the *source* of the district court's remand authority—*i.e.*, whether it is conferred by Section 405(g) or an inherent equitable power—is irrelevant to the question whether a remand precludes an appeal of an otherwise appealable order.

*Cohen v. Perales*, 412 F.2d at 48. See also *Taylor v. Heckler*, 778 F.2d 674, 676-677 (11th Cir. 1985).<sup>12</sup>

b. In her effort to reply to our argument, respondent wholly misconceives it. She states (Br. 13-15) that we are claiming a right to appeal from a "fourth sentence" remand order, although we concede that there can be no appeal from a "sixth sentence" remand order under 42 U.S.C. 405(g). Thus, she concludes (Br. 30-31), we are asking courts to enter an intricate thicket of distinguishing among remand orders, a task whose difficulty, in her view, is demonstrated by our disagreement about what type of remand order is involved here.

Respondent is correct that we disagree about whether the remand in this case was issued under the sixth sentence of Section 405(g); we think it clear that it was not.<sup>13</sup> But that disagreement is irrelevant to our argument. The point remains that we are appealing *not* from the remand itself, but from the district court's antecedent decision—unquestionably made under the authority granted by the fourth sentence of Section 405(g)

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<sup>12</sup> To be sure, most decisions sustaining the Secretary's right of appeal in circumstances such as these have relied on the rationale of *Cohen v. Beneficial Industrial Loan Corp.*, which also was relied upon in *Perales*, 412 F.2d at 48.

<sup>13</sup> Respondent's contention (Br. 28-29) that the district court's remand in this case was governed by the sixth sentence of 42 U.S.C. 405(g), and for this reason could not be appealed by the Secretary even under our theory, is wholly without merit. The case was not remanded for the receipt of "new" and "material" evidence to facilitate the court's own review of the Secretary's decision; it was remanded only after, and as a consequence of, such review by the court, which found the Secretary's decision unlawful because of its reliance on the Listing of Impairments. As explained in our opening brief (Gov't Br. 23-24), the courts of appeals have uniformly recognized that such a remand is *not* governed by the sixth sentence of Section 405(g). Contrary to respondent's suggestion (Br. 28, 29), the fact that the district court's order contains the phrase "for good cause shown"—a phrase also contained in the sixth sentence of Section 405(g)—does not alter the fundamental character of the order.

—reversing the Secretary for an error of law in his reliance on the Listing of Impairments in the governing regulations. That is the decision we contend is made “final” both by the explicit terms of Section 405(g) and by general principles of finality. And since the respondent’s action for judicial review has been effectively terminated for present purposes (though not for purposes of an award of attorney’s fees) by the remand, an appeal properly lies. Because the remand itself is not the subject of the Secretary’s appeal in a case such as this, there is no need to distinguish between different types of remands as a precondition to entertaining his appeal.

The point, we believe, is well illustrated by the closely analogous ruling of this Court in *Waco v. United States Fidelity & Guaranty Co.*, 293 U.S. 140 (1934). In that case, a third party who had been impleaded in a state court removed the action to a federal court; the federal court in “a single decree” (*id.* at 142) dismissed the action against the third party and, there being no remaining diversity of citizenship, remanded the case to the state court. One of the defendants then sought to appeal “not from the order of remand, but from that dismissing its action against [the third party].” *Ibid.* Although recognizing that then (as now, see 28 U.S.C. 1447(d)) no appeal lay from an order of remand, this Court upheld the defendant’s right to appeal the dismissal of its action against the third-party defendant. If the appeal was sustained, even though it might not affect the order of remand, it would restore the third-party defendant to the action. So here, if the appeal is sustained, it will restore the decision of the Secretary and the regulatory policy that was effectively invalidated by the district court. Accord, *Mitchell v. Carlson*, No. 89-1377 (5th Cir. Mar. 15, 1990), slip op. 2659-2663.<sup>14</sup>

<sup>14</sup> Because the subject of the Secretary’s appeal was not the remand itself, but the district court’s overturning of the Secretary’s decision (and the legal ruling on which it was based), the Secretary’s right of appeal is fully consistent with the general rule, cited

c. Respondent’s reliance (Br. 14, 17-20, 35) on the decision last Term in *Sullivan v. Hudson*, 109 S. Ct. 2248 (1989), is misplaced. The issue the government argued and lost in *Hudson* is whether attorney’s fees may be awarded under the EAJA (28 U.S.C. 2412) for services rendered in proceedings before the agency on remand—an issue that is quite distinct from the question of appellate jurisdiction under a statute enacted long before the EAJA. Under the EAJA, no fees can be awarded for work done at any level (administrative or judicial) until it is determined whether the claimant is a “prevailing party” on his or her underlying claim for benefits. *Sullivan v. Hudson*, 109 S. Ct. at 2255. When a court sets aside the Secretary’s initial decision denying benefits and remands the entire cause to the Secretary, that determination must await the outcome of the rehearing on remand and any further action for judicial review. To accommodate this feature of the EAJA, it is appropriate for the record on remand to be filed with the court if the claimant has prevailed, so that a fee determination may be made. Thus, as the Court noted in *Hudson*, “for purposes of the EAJA,” finality must await the outcome of proceedings on remand. 109 S. Ct.

by respondent, that “a [district court’s] remand order [to any administrative agency] is ‘interlocutory’ rather than ‘final,’ and thus may not be appealed immediately” under 28 U.S.C. 1291. See Resp. Br. 12-13 (quoting *Occidental Petroleum Corp. v. SEC*, 873 F.2d at 329). In fact, *Occidental Petroleum* sustained the agency’s right of appeal where, as here, the district court’s order resolved a legal issue on which effective appellate review might be foreclosed at a later date.

The fact that the Secretary’s appeal is from the district court’s ruling on the merits (not the resulting remand) also serves to distinguish this case from those in which the courts have not permitted a claimant to appeal a pure remand order. Thus, the result we believe Section 405(g) requires would not impose a burden on the courts of appeals of entertaining appeals by claimants who challenge the court’s separate decision to remand for further proceedings.

at 2255.<sup>15</sup> But the proposition that the absence of finality with respect to attorney's fees does not affect finality for purposes of appeal is one well recognized by this Court. See *Budinich v. Becton Dickinson & Co.*, *supra*. Thus, respondent is in error in suggesting that the decision in *Hudson* somehow resolves the issue here.<sup>16</sup>

<sup>15</sup> The passage in the House Report on the 1985 amendments to the EAJA quoted by respondent (Br. 18 n.13, 27) has no bearing on the proper interpretation of 28 U.S.C. 1291 and 42 U.S.C. 405(g), which were enacted many years earlier. In any event, that passage was part of a discussion about the practical application of the EAJA in the particular context of remand orders that do not in themselves render a claimant a "prevailing party" on his underlying benefits claim; it did not express any view on the appealability question. See H.R. Rep. No. 120, 99th Cong., 1st Sess. 19-20 (1985).

<sup>16</sup> Respondent contends that we made a crucial concession in *Hudson* that a remand order from a district court to the agency is not a final determination of the civil action and that the district court "retains jurisdiction to review any determination rendered on remand." Resp. Br. 14, 19, quoting *Hudson*, 109 S. Ct. at 2255 (quoting *Hudson* Pet. Br. at 16-17). The single sentence in our opening brief in *Hudson* (at 16-17) upon which respondent apparently relies stated: "Respondent asserts that since the reviewing court retains jurisdiction to review any decision rendered on remand [footnote quoting sixth sentence of Section 405(g) omitted], the remand order does not terminate the judicial action, and the proceedings on remand must therefore be treated as part of the civil action for purposes of EAJA." This sentence essentially recited the respondent's position as articulated in her brief in opposition; it did not concede that a remand does not terminate the judicial action, and it did not purport to be a definitive of explication 42 U.S.C. 405(g) in all respects, especially as regards appealability under 28 U.S.C. 1291, which was not mentioned.

Any doubt on this score is dispelled by our reply brief on the merits in *Hudson* (at 14-17). There, we answered at length the respondent's reliance on the sixth sentence of Section 405(g). We argued (Reply Br. 16), citing *Cohen v. Perales*, *supra*, that an order modifying or reversing the Secretary's decision on the merits and remanding for a rehearing under different legal standards "is a 'final judgment' that effectively terminates the proceedings for judicial review of the particular decision of the Secretary that was modified or reversed." Moreover, in both our opening brief (at 17)

d. In sum, the action brought by respondent for judicial review of the Secretary's decision has come to an end, except with respect to the question of attorney's fees. As in the *Waco* case, we do not seek to appeal the order of remand itself, but we do claim a right to appeal the district court's final ruling on an issue of law. If the Secretary's position on that issue is correct, the district court was required to affirm his decision and the court of appeals will be required to reinstate that decision. If, on the other hand, the Secretary's position is held by the court of appeals to be incorrect, there will be a distinct advantage to claimants generally as a result of the prompt appellate holding to that effect. Under the Secretary's announced policy concerning acquiescence in the adverse rulings of a circuit court of appeals within that circuit, the Secretary will either seek further review of the court of appeals' ruling or will promptly publish his acquiescence in it. See 55 Fed. Reg. 1012 (Jan. 11, 1990). But until and unless such a definitive ruling by the court of appeals is obtained, no acquiescence can be forthcoming with respect to an issue on which district court holdings (and even the holdings of other circuits) conflict with the Secretary's view.<sup>17</sup> Such

and reply brief (at 15), we urged that whether or not the particular district court decision was "final," attorney's fees should not be awarded for work done at the administrative level. We of course do not challenge the Court's contrary holding in *Hudson* regarding the availability of attorney's fees, but the Secretary cannot fairly be taken to have made any concessions there that undermine his right of appeal here.

<sup>17</sup> Respondent suggests (Br. 35-36 n.29) that we are relying on Section 1292(a)(1) as an independent basis of jurisdiction. Although such reliance was indicated in our certiorari petition (Pet. 18-19), we did not press it in our opening brief. Rather, we sought (Gov't Br. 33-34 n.27) to support our finality argument by showing that, in the absence of specific statutory review provisions, an action such as this would have been brought as an independent action for mandamus or an injunction, and the court's order setting aside the agency's decision and ordering the Executive Branch official to

a ruling by the court of appeals will also serve the public interest by relieving the district courts in the circuit of the burden of further litigation on the legal issue. Moreover, in many instances involving an important administrative policy, allowing an appeal from a district court ruling that the policy is invalid will eliminate the widespread uncertainty created by the district court's opinion.

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For the foregoing reasons and those stated in our opening brief, it is respectfully submitted that the judgment of the court of appeals should be reversed.

KENNETH W. STARR  
*Solicitor General*

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conduct a new round of administrative proceedings would unquestionably have been subject to an immediate appeal.

Contrary to respondent's suggestion (Br. 48-50), the availability of interlocutory appeals under 28 U.S.C. 1292(b) should not affect a determination of appealability as of right either in theory or in practice. To do so would be to hold that an appeal that Congress has authorized as of right would be replaced by an appeal that is wholly within the unreviewable and absolute discretion of both the district and appellate courts.